No. 97-8629-CFY Title: Eddie Richardson, Petitioner
v.
United States

Docketed: April 10, 1998 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Apr 7 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 20, 1998)
	Apr 20 1998	Waiver of right of respondent United States to respond filed.
	May 6 1998	DISTRIBUTED. May 21, 1998
	May 19 1998	Response requested.
	Jun 11 1998	Order extending time to file response to petition until July 20, 1998.
	Jul 16 1998	Order further extending time to file response to petition until August 20, 1998.
	Aug 20 1998	Brief of respondent United States filed. VIDED.
	Sep 3 1998	REDISTRIBUTED. September 28, 1998
	Oct 5 1998	Petition GRANTED. limited to the following question:"Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the 'series of violations' required for conviction for conducting a continuing criminal enterprise in violation of 21 U.S.C 848." SET FOR ARGUMENT February 22, 1999. **********
	Oct 19 1998	Motion of petitioner for appointment of counsel filed.
	Oct 26 1998	DISTRIBUTED. October 30, 1998 (Page 25)
	Nov 2 1998	Motion for appointment of counsel GRANTED and it is ordered that William A. Barnett, Jr., Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner in this case.
	Nov 17 1998	Order extending time to file brief of petitioner on the merits until November 25, 1998.
	Nov 18 1998	Brief amicus curiae of Nat. Assoc. of Criminal Defense Lawyers filed.
	Nov 25 1998	Joint appendix filed.
	Nov 25 1998	Brief of petitioner Eddie Richardson filed.
	Jan 7 1999	Order extending time to file brief of respondent on the merits until January 13, 1999.
	Jan 13 1999	Brief of respondent United States filed.
	Jan 14 1999	CIRCULATED.
	Jan 15 1999	Record filed.
	Jan 25 1999	Record filed.
	Feb 10 1999	Reply brief of petitioner Eddie Richardson filed.
	Feb 22 1999	ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. [redacted] 97-8629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

EDDIE RICHARDSON, Petitioner,

vs.

UNITED STATES, Respondent

MOTION FOR LEAVE TO
PROCEED *IN FORMA PAUPERIS*

The Petitioner, Eddie Richardson, requests leave to file the attached Petition for Writ of *Certiorari*, without prepayment of costs and to proceed *in forma pauperis*. Petitioner's counsel has been appointed by the United States District Court for the Northern District of Illinois pursuant to 18 U.S.C. § 3006A.

By: William A. Barnett

William A. Barnett, Jr.
Counsel of Record
135 S. LaSalle St.
Suite 3600
Chicago, Illinois 60603
(312) 726-4480

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

EDDIE RICHARDSON, Petitioner,

vs.

UNITED STATES, Respondent

On Petition for Writ of *Certiorari*
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF *CERTIORARI*

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97-8629
Richardson

QUESTION PRESENTED

whether due process requires that the jury be instructed that it must unanimously agree as to the commission by the defendant of each of three predicate narcotics violations in order to find that the defendant engaged in a continuing criminal enterprise as prohibited by 21 U.S.C. § 848.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals (Appendix, Exhibit A) is reported at 130 F.3d 765 (7th Cir. 1997). The decision of the Seventh Circuit Court of Appeals denying a petition to the Seventh Circuit for rehearing with suggestions for rehearing *en banc*, filed by one of Petitioner's co-defendants at trial, is attached as Exhibit B to the Appendix.

BASIS FOR JURISDICTION

The Seventh Circuit's order affirming the Petitioner's conviction and sentence was entered on November 14, 1997. (Appendix, Exhibit A, p.1). The Seventh Circuit denied a petition for rehearing with suggestion for rehearing *en banc*, filed by one of Petitioner's co-defendants at trial, on January 7, 1998. (Appendix, Exhibit B). This Court has jurisdiction to review the Seventh Circuit's affirmance of Petitioner's conviction by issuing a writ of *certiorari* pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

STATUTORY PROVISION INVOLVED

Title 21, United States Code, § 848

(a) Penalties; forfeitures.

Any person who engages in a continuing criminal enterprise shall [be guilty of an offense] . . .

. . .

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with

five or more other persons with respect to whom such person occupies a position or organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

. . .

RULE INVOLVED

Rule 31, Federal Rules of Criminal Procedure

Rule 31. Verdict

(a) Return. The verdict shall be unanimous. . .

STATEMENT OF THE CASE

Eddie Richardson was charged in two counts of a three-count indictment charging him and his codefendants in Count One thereof with engaging in a conspiracy to sell narcotics including heroin, cocaine and crack cocaine, in violation of 21 U.S.C. § 846. Richardson and codefendant Carmen Tate were charged in Count Two with engaging in a continuing criminal narcotics enterprise, in violation of 21 U.S.C. § 848. Count Three charged Carmen Tate and another person with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. (Appendix, Exhibit A, p.2). The indictment alleged no overt acts in furtherance of the conspiracy, nor were any substantive violations of 21 U.S.C. 841 charged in the indictment against either Richardson or any of his codefendants.

Codefendant Tate submitted, and Richardson adopted the request for two proposed instructions relating to the elements of the continuing criminal enterprise charge. (Appendix, Exhibits C and D). These proposed instructions each required that in order to convict, the jury must unanimously agree as to which three acts of the defendant constituted the series of narcotics violations necessary to find a violation of § 848. The district court, over objection, refused these instructions and instead gave the government's proposed instruction which specifically instructed the jury that it need not agree as to the particular three or more federal narcotics offenses committed by the defendant. (Appendix, Exhibit E).

Richardson was convicted of both counts in which he was charged and sentenced to life imprisonment. (Appendix, Exhibit A, p.2). He appealed his conviction to the Seventh Circuit Court of Appeals. On appeal, Richardson argued, *inter alia*, that the district court had erred in refusing to instruct the jury that it must unanimously agree as the predicate narcotics violations he had committed. The Seventh Circuit, with little discussion, following its own precedent in *United States v. Kramer*, 955 F.2d 479, *cert. denied*, 506 U.S. 998 (1992), rejected this argument and affirmed the conviction. (Appendix, Exhibit A, p. 22).

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's holding in this case, following its holding in *United States v. Kramer*, 955 F.2d 479, *cert. denied* 506 U.S. 998 (1992), is in direct conflict with the holding of the Third Circuit in *United States v. Echeverri*, 854 F.2d 638 (1988), that a jury, in order to convict a defendant of engaging in a continuing criminal enterprise, must unanimously agree as to the commission of each of at least three predicate federal narcotics violations. This issue relates directly to the defendant's rights to a unanimous verdict under the Sixth Amendment and Rule 31, Federal Rules of Criminal Procedure, and to due process under the Fifth Amendment. This Court should accordingly resolve this conflict between the circuits.

This Court has long recognized that due process requires proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970). Furthermore, the Sixth Amendment and Rule 31, Federal Rules of Criminal Procedure, require that the jury's verdict be unanimous. *Andres v. United States*, 333 U.S. 740, 748-49, 68 S.Ct. 880, 884-85, 92 L.Ed 2d *1055 (1948)*.

The question remains as to what the jury must be unanimous about. This Court, in *Schad v. Arizona*, 501 U.S. 624 (1991), discussed the issue at length, and limiting its consideration to

the due process requirement of unanimity, indicated that the scope of jury unanimity is primarily a question of legislative intent, although due process limits the legislature's definitional power. A plurality of the Court concluded that when a statute enumerates alternative routes for its violation, whether jurors must be unanimous as to a particular route depends on two questions. First, did the legislature intend the routes to establish separate offenses, requiring unanimity, or different means, for which unanimity is not required. Second, if the legislature intended the different routes to be mere means of violating the statute, is the statute's definition of the crime in conformity with the requirements of due process?

With respect to a charge of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, the question is then in the first instance, whether the legislature intended that the predicate narcotics violations be elements of the offense requiring as to each proof beyond a reasonable doubt and agreement of the jurors, and secondly, if not, whether due process requires it nevertheless. The Seventh Circuit's analysis of the issue relies principally on its view of the legislative intent in enacting the prohibition against engaging in a continuing criminal enterprise. As it stated in *United States v. Canino*[1], 949 F.2d 928, 948 (7th Cir. 1991):

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[1]The Seventh Circuit followed the holding in *United States v. Canino* in deciding *United States v. Kramer*, 955 F.2d 479 (7th Cir. 1992), the precedent cited in affirming Petitioner's conviction.

> The point of the CCE statute is to impose special punishment on those who organize and direct a significant number of larger scale drug transactions; the exact specification by unanimous jury consent of any particular three . . . offenses is irrelevant to any theory about why punishment should be enhanced for such uniquely antisocial activity.

On the other hand, as the Third Circuit, sitting *en* banc, points out, the punitive purpose of a criminal statute will never be served by providing more procedural protections to the defendant. *United States v. Edmonds*[2], 80 F.3d 810, 818 (3d Cir. 1996). Not finding the legislative history of the CCE statute illuminating as to the juror unanimity issue, the Third Circuit analyzed the issue relying on several background interpretative principles, historical tradition in criminal jurisprudence, constitutional considerations, and the rule of lenity. The Third Circuit concluded that, as it had previously held in *United States v. Echeverri, supra,* that juror unanimity was required.

While the Third Circuit, in *United States v. Edmonds, supra,* primarily relied on statutory construction in coming to its

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[2]The Third Circuit held in *United States v. Echeverri*, 854 F.2d 638 (1988), that the CCE statute requires juror unanimity as to the identity of each of the three related violations comprising the continuing series. In *United State v. Edmonds*, 52 F.3d 1236 (3d Cir. 1995), the Third Circuit followed its holding in *Echeverri, supra*, and reversed the defendant's conviction. The government petitioned for rehearing, and the Third Circuit vacated the reversal and reheard the matter *en banc*, to determine whether its holding as to the unanimity requirement was correct, and if so, whether the district court's refusal to instruct the jury in conformity with *Echeverri* was harmless error. The Third Circuit, in a lengthy and well reasoned opinion, concluded that unanimity as to the identity of the predicate violations was required, but that in the context of the *Edmonds* case, the failure to so instruct the jury was harmless error, and affirmed the district court.

conclusion, it recognized that a construction of the CCE statute which did not require juror unanimity as to the predicate violations, would very likely render it in violation of the due process requirements of the Constitution. It recognized that due process is defined in part by historical practice, citing *Schad v. Arizona, supra.* And in that context, stated:

> As mentioned, interpreting predicate offenses as different means of violating a single continuing series element marks a departure from historical guarantees on the degree of factual agreement necessary to establish a conviction.

United States v. Edmonds, 80 F.3d, at 819. Criminal trials have long ensured jury agreement as to the facts establishing an offense. This is because criminal statutes and the common law have generally defined crimes in terms of conduct and accompanying mental state that takes place in a single place at a specific time. Where there is a risk that a jury will convict without agreement on a discrete set of actions, courts have required specific unanimity instructions. *United States v. Edmonds, supra,* 80 F.3d, at 819, citing *United States v. Holley,* 942 F.2d 916, 928-29(5th Cir. 1991). The Third Circuit thus concluded that substantial agreement on a discrete set of actions is essential to ensure that the defendant is guilty beyond a reasonable doubt of some specific legal conduct.

In Petitioner's case, unlike in *United States v. Kramer, supra*, the defendants were not charged in any substantive counts for violations of the narcotics laws. At trial the evidence of

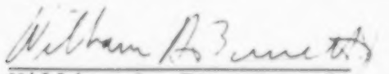
violations consisted of the testimony of three cooperating witnesses as to activity which spanned a period of years with little particularized description of discrete incidents. Thus it is impossible to select from a group of violations whether charged as separate offenses or even as overt acts, any three as to which the jury may have agreed. This is thus an appropriate case to announce a rule that, at least with respect to the CCE statute, the jury must be able to agree unanimously with respect to three violations which can be identified by the defendant and the court as well as any reviewing court.

CONCLUSION

For these reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

EDDIE RICHARDSON

By: 

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APPENDIX

A. Opinion of the United States Court of Appeals for the Seventh Circuit, in *United States v. Richardson, et al.*, Nos. 95-3053, 95-3054, 96-2551, 96-2587, 96-2591, 96-2644, 96-2682 and 96-3197, issued November 14, 1997, 130 F.3d 765 (7th Cir., 1997).

B. Order of the United States Court of Appeals for the Seventh Circuit, in *United States v. Tate*, No. 95-3054, issued January 7, 1998.

C. Tate's Proposed Instruction No. 22

D. Tate's Proposed Instruction No. 23

E. Government Instruction No. 46B

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 95-3053, 95-3054, 96-2551, 96-2587,
96-2591, 96-2644, 96-2682, and 96-3197

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDDIE RICHARDSON, CARMEN TATE,
RODNEY PALMER, NATE HALL,
STANLEY WESTMORELAND, MARTELL LEE,
SECTRIC CURRY, and LENNEL SMITH,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 CR 187—**James F. Holderman**, *Judge*.

ARGUED SEPTEMBER 19, 1997—DECIDED NOVEMBER 14, 1997

Before BAUER, RIPPLE, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. It wasn't Alice's Restaurant, but starting in 1990, if it was crack you wanted, you could get it at Highway Beef, a stand at the corner of Gladys and Cicero on the west side of Chicago. During the late 1980's, if it was heroin you wanted, you could get it two blocks away at the Courtway Building on Congress at Cicero. And all the dope came courtesy of a conspiracy involving members of a street gang with a

charming name—the Undertaker Vice Lords. The gang operated around Cicero Avenue, near the point where it is bisected by the Eisenhower Expressway.

The operation was put out of business, and on March 23, 1994, a three-count indictment was filed charging conspiracy to distribute narcotics, in violation of 21 U.S.C. § 846; charging two leaders—Eddie Richardson and Carmen Tate—with engaging in a continuing criminal narcotics enterprise, in violation of § 848; and charging Tate and another person with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. A jury trial in the district court involving a gaggle of defendants ran from March 29, 1995, until May 23, 1995, before Judge James F. Holderman; the eight defendants currently before us were found guilty on all the charges against them, although three others who went to trial were acquitted. In addition, one alleged gang member was convicted in a separate trial and several others entered guilty pleas. Sentencings were held over a 1-year period from August 1995 until August 1996. Sectric Curry, Nate Hall, Richardson, and Tate received life imprisonment; Martell Lee and Stanley Westmoreland received 324 months; Rodney Palmer received 292 months, and Lennel Smith 194 months, sentences which vividly show how much society's attitudes about drugs have changed since Alice's time.

The Undertaker Vice Lords were formed in the 1970's by Eddie Richardson. The gang was organized in a hierarchy with five groups of members called "generations"; members of each generation were people of roughly the same age who joined the gang at roughly the same time. Each generation had its own "King" and "Prince." Richardson was the "King of all the Undertakers" and a "Universal Elite" within the Vice Lord Nation. Tate had no rank but was a member whom, it is said, all Undertakers looked up to. The alleged conspirators in this case

came from several of the generations and some were leaders of their generations. Richardson was the one who designated who would be a leader. Two members of the fourth generation, Michael Sargent and Johnnie Chew, and a member of the fifth generation, Andre Cal, pled guilty and testified for the government at trial.

The government alleged that Richardson not only controlled the gang but also oversaw the distribution of heroin, crack cocaine, and powder cocaine. Richardson and Tate were said to permit only members of the Undertakers and others granted permission by them to sell drugs in the Undertakers territory. The drugs were sold at well-established drug "spots," and there were established locations for preparing and packaging the drugs. A Chicago Police Department search of one of the latter locations in June 1985 uncovered a kilogram of heroin, irons, mixing bowls, blenders, and strainers. During the search Tate asked the police to let everyone else go because the heroin belonged to him; he said that he bagged it himself because he did not trust his workers. From the packaging locations, runners delivered the drugs to the drug spots and collected the money, and the workers then sold the drugs. Richardson and Tate enforced the rules regarding drug sales by a system of punishments called "violations." The violations ranged from not being allowed to continue selling, to beatings with bricks, bottles, or ax handles, being stabbed or shot, and even, at least once, to being killed.

The sale of heroin was the primary object of the conspiracy from 1984 until 1990. From 1984 until 1987 brown heroin was distributed out of the Courtway Building in packs which contained 25 $25 packets of user quantities of heroin. For each pack sold, the workers were paid $100, and Richardson and Tate received the balance. From the winter of 1987 until the end of 1988 Chew ran the heroin spot in the Courtway Building. He

estimated that during that time, the Undertakers sold a "frame"—25 packs of 25 bags—every 3 to 4 days, or approximately 25 kilograms of brown heroin. Others selling brown heroin from the Courtway Building included Hall and Westmoreland. Smith also admitted to selling heroin for Richardson and Tate at Cicero and Van Buren and Laramie and Van Buren and, in a tape-recorded conversation, he said he worked for Tate and Richardson from 1985 to 1988, making about $50,000.

In the fall of 1988 Richardson and the Undertakers began to distribute white heroin from the Courtway Building. Chew initially was the runner, followed by Darryl Joyner, Lee, and Sargent. Lee was arrested in January 1989 carrying $2,700 in cash and a beeper. After the arrest, Sargent assumed Lee's responsibilities; Richardson provided Sargent with an average of $40,000 to $60,000 worth of heroin three times a week. Joseph Westmoreland, who was convicted in a separate trial, estimated that the conspiracy was collecting about $20,000 to $30,000 per day. Based on these statements, the Undertakers sold slightly more than 100 kilograms of white heroin between 1988 and 1990.

Others were also involved in the heroin operation. Curry sold heroin while Sargent was the runner; in fact, Sargent considered Curry his best worker. Curry was arrested in August 1989 and, in a tape-recorded conversation, told an agent that he made more than $50,000 selling drugs for Richardson and Tate. Hall sold heroin from the Courtway Building from May 1988 until December 1988. In a June 1991 conversation with a government agent, Hall confirmed that he was selling heroin for Richardson and that he had been working for Tate and Richardson since 1983. He claims he made approximately $60,000. Lee also was involved in the white heroin trafficking. On October 9, 1990, and November 24, 1990, Lee sold an agent 19 $20 bags of white heroin.

In November 1990 the Undertakers branched into the distribution of crack, primarily from the beefstand at the corner of Gladys and Cicero. Cal testified that he and Tate cooked a quarter kilo of cocaine into crack two to three times a week for 10 months. That would mean that during that time, they sold over 25 kilograms of crack. Curry, Hall, Lee, Palmer, Smith, and Westmoreland each participated in the sale of crack at the beefstand.

Richardson and Tate also oversaw the distribution of powder cocaine. In 1988 Chew became a runner for cocaine. In addition, Hall, Curry, and Lee were involved in the cocaine operation.

The conspiracy was uncovered when, beginning in 1988, John Rotunno, an agent with the Bureau of Alcohol, Tobacco & Firearms, began an undercover investigation into an illegal gun trade on the west side. In August 1990 he abandoned that investigation and began looking into narcotics sales and street gangs. Posing as the brother of confidential informant Debra Schwede, Rotunno said he was a large marijuana dealer from California who had been arrested by the DEA and was currently on parole. He began to make small purchases of narcotics from low-level members of the gang, who then cooperated with the government.

The facts just recited have been, as required, viewed in the light most favorable to the government. The defendants don't agree. First, they say, this was not one big conspiracy with a monopoly on the Cicero Avenue drug trade. To the extent the defendants sold drugs, they claim to have sold them as members of several smaller conspiracies. Being a member of the Undertakers, they say, does not make one a member of an overarching drug conspiracy. That there is a variance between the indictment and the proof—that is, that there were several smaller conspiracies rather than one large one—is not a

novel argument in drug cases, and the law is well-established. We will summarize briefly.

A contention that there were several conspiracies, rather than the one charged, amounts to a "challenge to the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same conspiracy." *United States v. Townsend*, 924 F.2d 1385, 1389 (7th Cir. 1991). The court considers the evidence in the light most favorable to the government, defers to the credibility findings of the jury, and overturns a verdict only when the record contains no evidence from which the jury could find guilt beyond a reasonable doubt. *United States v. Hickok*, 77 F.3d 992 (7th Cir.), *cert. denied*, 116 S. Ct. 1701 (1996).

A conspiracy is a combination of two or more persons joined to further a common purpose or design. *United States v. Shorter*, 54 F.3d 1248 (7th Cir.), *cert. denied*, 116 S. Ct. 250 (1995). To establish that an individual was a member of a conspiracy the government must prove that the individual knew of the conspiracy and intended to join and associate himself with its criminal design and purpose. *United States v. Auerbach*, 913 F.2d 407 (7th Cir. 1990). The government need only prove the existence of the conspiracy and a participatory link with each defendant. *United States v. Caudill*, 915 F.2d 294 (7th Cir. 1990). The scope of the conspiracy is determined by the scope of the agreement between the defendants. The government must show that a defendant joined the agreement, not the group. The defendant need not have known all the other conspirators nor have participated in every aspect of the conspiracy. A key question is whether the defendants had a mutual interest in achieving the goal of the conspiracy.

The question whether there is one conspiracy or several is a question of fact, which is "something especially

within the jury's realm of expertise," and for that reason the jury "gets first crack" at deciding the issue. *United States v. Paiz*, 905 F.2d 1014, 1019 (7th Cir.), *cert. denied*, 499 U.S. 924 (1990). If the jury is properly instructed on the possible existence of multiple conspiracies, the "finding of a single conspiracy must stand unless the evidence taken in the light most favorable to the government, would not allow a reasonable jury so to find." *United States v. Mealy*, 851 F.2d 890, 898 (7th Cir. 1988), quoting *United States v. Urbanik*, 801 F.2d 692, 695 (4th Cir. 1986).

It is not relevant that the evidence might also be consistent with an alternate theory; say, that there were multiple conspiracies. Even if the evidence could arguably establish multiple conspiracies, there is no material variance from an indictment charging a single conspiracy. *See Townsend* at 1389.

Applying these principles to this case, we will briefly mention a few minor points raised by the defendants, which need not detain us long. First is the claim that the government somehow confused membership in the Undertakers with an agreement to join the conspiracy. We agree, of course, that the important point is not whether the defendants were Undertakers, nor whether they sold drugs. That they were Undertakers who sold drugs is virtually conceded. The issue is whether they sold drugs as members of the charged conspiracy. There must be evidence that they did if the convictions are to be sustained. We will return in a moment to the question of the sufficiency of the evidence.

Secondly, we note that there is no challenge to the jury instructions which were given, and those instructions properly included instructions—in fact, the defendants' proposed instructions—as to the possibility of multiple conspiracies. The jury was properly instructed and re-

turned its verdict that the eight individuals before us—though not the three it acquitted—were members of one overarching conspiracy. That determination is within the jury's realm of expertise.

Third, the multiple versus single conspiracy issue—which dominates the defendants' arguments—is premised, in part, on the characterization of the government's approach in this case as spinning a huge web and dragging in all sorts of undeserving people. To some degree the argument is one which invokes a sympathetic response. Curry, for instance, was portrayed as a pathetic addict, selling to meet his own needs.

But the argument loses some of its zip when we look at what exactly this conspiracy was all about. It was—as the indictment alleges—a conspiracy to sell on the street, user quantities of narcotics. Except for the leaders, Richardson and Tate, it appears that everyone was, in one way or another, simply a street seller or runner. This indictment did not attempt to show a far-ranging conspiracy involving the importers, the couriers who brought the drugs to Chicago, or the sources from whom Richardson and Tate obtained the drugs. This is a localized, neighborhood operation. What makes it large is the length of time it existed and, partly because of the length of time, the large quantities of drugs distributed. But in some sense, this conspiracy is a small part of what might be a much larger conspiracy.

Having made those preliminary remarks, we turn to the issue at hand. Does the evidence support the existence of one conspiracy? What exactly is the defendants' argument that the evidence is suspect? What was the scope of the agreement? Did the defendants have a mutual interest in achieving a goal?

There seems to be little question that the conspiracy existed from 1984 until 1991 and had three objectives:

monopolizing the sale of heroin; monopolizing the sale of crack in 1990 and 1991; and controlling who sold cocaine in Undertaker territory. Each of the defendants had agreements with other members of the group. They worked together as runners and workers to distribute drugs for Richardson and Tate. They worked specific, established spots where drugs were sold. They received a portion of the proceeds as payment for their efforts.

The defendants contend, however, that the government failed to prove that all drug sales within Undertaker territory were performed on behalf of Richardson or Tate; it failed to show a monopoly. The defendants point to evidence of drug sales which were unrelated and say that the government attempted to explain these away as instances in which people were granted permission to sell by Richardson. They seem to argue that the existence of other operations within Undertaker territory means that there were multiple conspiracies.

So, what was the evidence the defendants point to to support their claim that there was not one but multiple conspiracies? Chew, the government witness, said on direct examination that the Undertakers controlled the drug trade and had a policy on violations, but on cross-examination he said that although he was fired by Richardson for stealing drug money, he himself was never "violated" and continued his drug activities with Tate until he went to work for himself. When he worked for himself he bought cocaine from anyone he could. Andre Cal, who also testified for the government, said that he became a worker for another unrelated street operation conducted by codefendant Lee. There is an allegation about two competing cocaine operations: one run by Tate whose pony packs had staples through them; and one run by Curtis Kirkland, whose packs were marked with red marks. Cal, like Chew, said he was not punished for stealing money from Richardson. Cal also

testified that he went into the cocaine business with Anthony Flowers, and later, when Flowers was arrested, Cal became partners with another man named Scott. This drug business was independent of the Undertakers' operation. Sargent, another conspirator who testified, said that there were several other drug operations in Undertaker territory which were not shut down. But he also said that they were not shut down because they were no competition to Richardson's operation.

This in brief is the evidence on which the defendants rely to say that the Richardson-Tate conspiracy was not a monopoly and therefore multiple conspiracies existed. But why do the defendants see evidence of other independent dealings as fatal to the government's case?

Some of the time, the defendants seem almost to argue that the government is under some obligation to prove a monopoly; if Richardson and Tate did not monopolize the drug trade in Undertaker territory, there was a fatal variance between the government's theory that they did and the proof at trial which showed some sales which were independent of the conspiracy. We note first that in an ordinary case there is no requirement that a conspiracy achieve some sort of monopoly in order to exist. A conspiracy can exist side by side with another conspiracy. One person can be a member of more than one conspiracy, just as any person can hold down more than one job. *United States v. Blanding*, 53 F.3d 773 n.2 (7th Cir. 1995). It seems clear, however, that disloyalty of this sort to the conspiracy was strongly discouraged in this case. There are many instances of "violations." They range from beatings with bricks, bottles, and sticks to a beating which resulted in death. But again, evidence that a few people did something in violation of the rules without getting punished could be viewed by the jury as something other than evidence that those persons were not members of this conspiracy or that there were multiple conspiracies. Perhaps those people got away with something. The jury in this case was properly instructed as to the possibility of multiple conspiracies and chose to determine that eight of those indicted were members of the charged conspiracy and that three were not.

Other times what the defendants seem to be saying is that the government proceeded on a theory of monopoly and then changed theories midstream—a claim which is relevant also to the discussion that will follow regarding a request for a bill of particulars. By the time we became acquainted with this case, the government's theory was that the Richardson-Tate conspiracy controlled the heroin trade in Undertaker territory. The theory also was that the conspiracy controlled the crack trade in 1990 and 1991 but that the control of cocaine sales was less complete, and some unconnected sellers were operating either because their sales did not threaten the conspiracy or because Richardson gave them permission to operate. The defendants see this theory as different from the government's theory at the outset of the case.

We are not so sure. The indictment alleged that "the sale of user quantities of cocaine, cocaine base and heroin in Undertaker Territory was subject to the approval of defendants EDDIE RICHARDSON and CARMEN TATE." Now the government is saying that there was control of the heroin and crack markets for periods of time, but that cocaine sales were not so tightly controlled in that other cocaine dealers operated either with approval or because they were not large enough to be a threat. Nothing in that theory is materially inconsistent with the indictment.

Next, the defendants say that the statement in the government's February 21, 1995, proffer also reveals an inconsistency. The statement says that "[u]nder the rules of the gang, no one could sell heroin in Undertaker

Territory without the permission of Richardson." We are unable to find an inconsistency between that theory and the one we have been presented.

But the defendants' real contention, we believe, is that the government's theory was that the gang had a monopoly and that therefore anyone who sold drugs in the territory was considered by the government to be a member of this conspiracy, virtually without any other proof. They say:

> As shown at trial, there were numerous people selling drugs within the area established for the single, overall conspiracy charged in the indictment who had no agreement with Richardson or Tate. . . . The defendants, in their requests for a bill of particulars, repeatedly objected that the government's true theory was that the charged conspiracy was the gang and membership in the gang amounted to membership in the conspiracy. . . . Furthermore, the government's explanations of "permission" or "no competition" were merely afterthoughts to salvage the indictment once the trial testimony made clear that rather than a single overall conspiracy led by Richardson and Tate, there existed a myriad of independent drug sellers who were operating throughout Undertaker territory - some in virtual head to head competition with each other.

Or as Curry puts it more explicitly, the government's theory was that Richardson and Tate controlled the neighborhood "to such an extent that the only drugs available in that neighborhood came from Richardson or Tate and were sold by gang members."

If the government had relied solely on a syllogism—that Richardson and Tate had a monopoly on drug sales in the Undertaker territory; defendants sold drugs in the territory; therefore defendants sold drugs for Richardson

and Tate and were members of the conspiracy—and if there was no other evidence of the connection of the defendants to the conspiracy and further that the premise itself was faulty, the argument would have considerable force. But there was evidence and lots of it. The government presented tape recordings of each defendant except Richardson and Tate—as well as direct evidence of the acts and statements of each of the charged conspirators—sufficient to establish his personal involvement in the conspiracy. The evidence in this case was clearly sufficient to support the jury's verdict that a single conspiracy existed and that each convicted dealer was a member of the conspiracy.

Palmer, Smith, and Curry argue individually that there is insufficient evidence to link them to the conspiracy. We reject their arguments. Evidence of Palmer's membership includes two sales of crack to Agent Rotunno from the beefstand in November 1990. Plus, Schwede told Rotunno that Palmer was selling crack for the Undertakers and Sargent testified that Palmer sold crack at the beefstand. The beefstand, of course, was an important part of the Richardson operation.

Evidence of Curry's membership came from Cal and Sargent, who identified Curry as a seller of white heroin for the Undertakers and as his best worker. Curry was arrested while selling white heroin at Harrison and Kilpatrick, another of the Undertakers' drug spots. Furthermore, Curry told Rotunno that he had made more than $50,000 selling drugs for Richardson and Tate. In addition, he sold crack from the beefstand and was one of the first workers at the beefstand. On January 14, 1991, Agent Rotunno bought 10 bags of crack from Curry, and in a taped conversation in June of that year Curry confirmed that he still worked for Richardson and Tate. He bragged—though it appears everyone discounts his

claim—that he showed the Undertakers how to make rocks from cocaine.

As to Smith, he admitted that he sold drugs for Richardson and Tate for 3 years but claims there is no evidence that he joined the conspiracy. We disagree. He sold both heroin and crack and he witnessed a "violation." He said on tape that he made roughly $50,000 during the time he worked for Richardson and Tate. There was sufficient evidence for the jury to conclude that he was a member of the conspiracy. We now turn to several pretrial issues.

Curry contends that he is entitled to a new trial because Judge Holderman failed to grant his pretrial and repeated oral motions during trial for a bill of particulars. His argument is that the government changed its theory of this case mid-trial, as we just discussed. The theory at the beginning of trial, Curry says, was that membership in the Undertaker Vice Lords made one a member of the drug distribution conspiracy. When Judge Holderman made clear that that theory was not going to work, Curry contends that the government, for the first time, came up with the theory that no one sold drugs in Undertaker territory without Richardson's blessing, and if you sold drugs you thereby joined the conspiracy. In essence, Curry contends that he was involved with Curtis Kirkland, someone who, Curry says, all the government witnesses conceded was not a member of the conspiracy, and that it was this bit of information which caused the government to switch to a permission theory. Curry says he should have been granted his repeated requests for a bill identifying, at a minimum, the alleged conspirators.

The decision whether to require a bill of particulars is within the sound discretion of the trial judge. We will reverse a decision to deny a bill of particulars only when

the judge clearly abuses his discretion. A defendant must suffer actual prejudice from the denial. *United States v. McAnderson*, 914 F.2d 934 (7th Cir. 1990). But Curry is only entitled to know the offense with which he is charged, not all the details of how it will be proved. *United States v. Kendall*, 665 F.2d 126 (7th Cir.), *cert. denied*, 455 U.S. 1021 (1981). As we said above, from the indictment Curry was notified of the permission theory. It said that the sale of user quantities of cocaine, cocaine base, and heroin in Undertaker territory was subject to the "approval" of Richardson and Tate. "Approval" and "permission" are words which, in this context, convey the same principle. Judge Holderman, on this point, did not abuse his discretion.

Richardson and Tate each argue that they should have been granted separate trials. Their basic contention is that prejudicial testimony was elicited during the cross-examination of the government witnesses. We note at the outset that most of the testimony would have been admissible in separate trials. Richardson claims that defenses antagonistic to his were presented by Curry, Dockery, and Hall. The three claimed that they were recruited by Richardson, who took advantage of their addictions to get them to sell drugs. In addition, Richardson contends that two pieces of evidence would not have been admitted in a separate trial. One was a tape of a discussion between Agent Rotunno and Curry, in which Rotunno makes a remark about Richardson and Tate being "bad guys." The other is the proffer of Nate Hall, used by the government in its rebuttal case.

Tate makes a similar argument regarding antagonistic defenses; he finds the defenses of Curry, Hall, Palmer, Dockery, and another defendant, Randy Teagus (who was acquitted), were antagonistic to him regarding their claims to be addicts, selling drugs to support a habit. In addition, Hall, Palmer, and Dockery, Tate claims, solic-

ited testimony that they were subjected to "violations" ordered by Tate and testimony that a drug seller died of a beating. Tate contends that even the government objected to the latter testimony as being prejudicial.

There is a preference in the federal system for joint trials of defendants who are indicted together. Nevertheless, Rule 14 of the Federal Rules of Criminal Procedure allows for an order of severance or other relief which justice may require if a defendant is prejudiced by a joinder with others. In *Zafiro v. United States*, 506 U.S. 534 (1993), the Court concluded that mutually antagonistic defenses are not prejudicial per se. In fact, the Court concluded that a judge should grant a severance only if there is a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." At 539. Even if there is a risk of prejudice, a judge must determine whether it is the type of prejudice that can be cured with limiting instructions to the jury. The decision whether to grant a severance is left to the sound discretion of the trial judge. *Id.*

In this case, the judge declined to order a severance but instructed the jury that it was to give separate consideration to each defendant; that each defendant was entitled to have his case decided on the evidence against him. We, of course, presume that a jury follows the instructions as given. *United States v. Crockett*, 979 F.2d 1204 (7th Cir.), *cert. denied*, 507 U.S. 998. (1992). Furthermore, blame-shifting does not prevent a jury from making a reliable judgment regarding a defendant. *United States v. Ramirez*, 45 F.3d 1096 (7th Cir. 1995). And as we said above, the testimony of the government witnesses, Chew, Cal, and Sargent, of which Tate especially complains, would be admissible in separate trials. As the Court said in *Zafiro*:

> [A] fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant.

At 540. It was not an abuse of discretion to deny the motions for severance.

The defendants also challenge a number of evidentiary rulings. These rulings are reviewed for an abuse of discretion. *United States v. Prevatte*, 16 F.3d 767 (7th Cir. 1994); *United States v. Buchbinder*, 796 F.2d 910 (7th Cir. 1986); *United States v. Johnson*, 28 F.3d 1487 (8th Cir.), *cert. denied*, 513 U.S. 1098 (1994); *United States v. Davis*, 772 F.2d 1339 (7th Cir.), *cert. denied*, 474 U.S. 1036 (1985).

Nate Hall objects to the exclusion of his expert witnesses. One expert was Dr. Maisha Hamilton-Bennett, who was to testify as to the extent of Hall's drug addiction which he contended went to his coercion defense. The second was Jesse Beckom, who was an expert on gangs. Hamilton-Bennett's testimony was excluded because there was no dispute that Hall was an addict and the defense did not provide timely notice of its intent to call her. In fact, the government received her report over 5 weeks into the trial. Also, other evidence—of which there was plenty—of Hall's addiction was presented to the jury by other witnesses. Beckom's testimony was excluded on the basis of relevance because he had no familiarity with the Undertaker Vice Lords or its members. We see no abuse of discretion on this point.

Hall also claims that the government should not have been allowed to use his proffer in its rebuttal case. A proffer, of course, is a defendant's (or someone who is

hoping not to become a defendant) controlled statement to government agents made to facilitate plea agreements or discussions. Hall entered into a proffer agreement under which the government agreed not to use the information he provided during its case-in-chief. If Hall testified contrary to the agreement, however, or presented a position contrary to the substance of the agreement, all deals were off and the government would be allowed to use his statements against him. This sort of provision is standard fare in pretrial dealings over statements to be offered by defendants.

In Hall's proffer he said he participated in the conspiracy and began selling drugs after being approached by another member of the conspiracy. He said Richardson was the source of the heroin he sold. These statements were interpreted by the government to show that Hall was a willing participant in the conspiracy. At trial, Hall seemed to be trying to set up a defense of coercion. He called a police officer named Rodriguez to testify as to a pat-down of Hall in which drug paraphernalia was found, including a warm crack pipe and an empty bag which had previously contained crack. He was trying to show that he was a drug user and thus that he was coerced into selling drugs. This view of his situation was contrary to the gist of his proffer where he presented himself as a willing participant in the drug selling conspiracy. Under the circumstances, Judge Holderman didn't even come close to abusing his discretion when he permitted the government to use part of Hall's proffer against him as part of its rebuttal case. And it mattered not at all that Hall didn't personally testify contrary to the proffer because he in effect did the same thing by presenting Officer Rodriguez to the jury. *See United States v. Dortch*, 5 F.3d 1056 (7th Cir.), *cert. denied*, 114 S. Ct. 1077 (1993).

Finally, Carmen Tate argues that the district court improperly admitted evidence of a heroin seizure from him and others in June 1985. Tate claims this was evidence of a prior bad act, requiring analysis under Rule 404(b) of the Federal Rules of Evidence. But the seizure occurred during the existence of the conspiracy and the evidence was admitted pursuant to Rules 401 and 403. We see no abuse of discretion in this ruling.

Curry contends that, given his culpability and the severity of the sentence he was facing, he should have been allowed to tell the jury of his possible punishment during closing argument. Unfortunately for him, arguing punishment to a jury is taboo, as we again recently noted in *United States v. Lewis*, 110 F.3d 417 (7th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3258 (U.S. Oct. 7, 1997) (No. 96-9532). Furthermore, there is a difference of opinion regarding Curry's role in this offense. He claims he was a rather pathetic junkie who dealt some drugs to support his habit. Not everyone saw it that way. In his sentencing memorandum Judge Holderman, who saw the evidence firsthand, said Curry was not a minor participant in the conspiracy, but rather that he distributed and foresaw distribution of at least 30 kilograms of heroin and at least 7.5 kilograms of cocaine base.

All of the defendants contend that the prosecutor improperly vouched for witnesses during her rebuttal argument. The government virtually concedes that the prosecutor's statement was improper but contends that the response was invited by the argument of Curry's defense counsel. The relevant portions of the record are as follows: first, counsel for Curry:

> And I want to talk about one other thing Mr. Krulewitch [AUSA] mentioned. He said to you he represents the people of the United States. I think that was an attempt to somehow bring this home to you.

> I think it was an attempt to get some sympathy from you . . . .
>
> Mr. Krulewitch doesn't represent the interest of the people of the United States. The people are left to the states . . . .
>
> These people represent the interest of the federal government from Washington. They represent the interests of the federal agencies, like the Internal Revenue Service, like the U.S. Drug Enforcement Administration, like the Alcohol, Tobacco & Firearms. . . . But I do begrudge them trying to turn the war on drugs onto the victims of the war on drugs.

This, the government says, invited its response, given by another AUSA, Zaldwaynaka Scott:

> You heard about the government's witnesses. You heard them called all kinds of things, despicable, ridiculous, and some of the words Mr. Halprin used, I won't even repeat.
>
> And you heard about Agent Rotunno, you heard about the police officers that were called as witnesses in this case. You heard everybody called a liar. And you heard about what happened from the government's table in this case. The government put these witnesses on. The government called these liars. It's the government's fault.
>
> Well, ladies and gentlemen, if you think that Krulewitch, myself, Agent Hlista, and Agent Zopp went out there, called these people into this courtroom and put on perjured testimony, then you should acquit these men. You should send them home, because we had nothing else better to do with our careers and our lives but put on false testimony[.]

There were objections to these statements, and Judge Holderman gave an instruction to the effect that the

opinions of counsel are not evidence. The jury was told to disregard the statement. In his instructions to the jury the judge also stated that it is improper for a lawyer to offer his personal opinions on the credibility of witnesses during an argument to the jury.

We use a two-part analysis in assessing allegations of prosecutorial misconduct in closing argument. First we consider the prosecutor's remarks in isolation to see whether they are improper. We will waste no time on this step; impropriety is virtually conceded. The second step is to consider the remarks in context to see whether they had the effect of denying the defendants a fair trial. We look to the nature and seriousness of the statement; whether it was invited by the conduct of defense counsel; whether the jury was properly instructed to disregard the statement; whether the defense had an opportunity to counter the statement; and finally we look to the weight of the evidence against the defendants. *United States v. Johnson-Dix*, 54 F.3d 1295 (7th Cir. 1995); *United States v. Severson*, 3 F.3d 1005 (7th Cir. 1993).

The defendants had no opportunity to counter the prosecutor's statement, and the statement is one of which we disapprove. However, in every other regard, the factors lean against finding that the defendants were deprived of a fair trial. It is at least arguable that it was an invited response in the heat of battle, after several arguments attacking the government case. And also, importantly, the evidence in this case was such that this statement was not needed to put the government over the top. The weight of the evidence is clearly against the defendants. It defies credibility to think that one isolated statement coming at the close of a lengthy trial would sway the jury to cast aside doubts about the veracity of the government witnesses. Finally, the jury was instructed that the remark was improper, and we assume the jury follows instructions given by a judge. It was, to

be sure, an improper remark, but another adjective that comes to mind is that it was a stray remark. Coming as it did, at the end of a long trial, with the judge giving a curative instruction, this remark does not make for prejudicial error.

Moving on to jury instructions, we note that Richardson and Tate both argue that it was error for the judge not to give a unanimity instruction to the effect that the jury had to agree on the three federal narcotics offenses constituting the continuing criminal enterprise with which they were charged in count two. The argument is based on a case from the Court of Appeals for the Third Circuit, *United States v. Echeverri*, 854 F.2d 638 (1988). In *United States v. Kramer*, 955 F.2d 479, *cert. denied*, 506 U.S. 998 (1992), we expressly rejected the result in that case. We see no reason to reconsider *Kramer*.

The defendants also raise an issue regarding improper juror conduct which they say was not adequately investigated by the judge. After the close of the evidence but before closing arguments, an alternate juror wrote Judge Holderman saying that she had some concerns about the regular jurors. She said some of them "appear to be sleeping" during the presentation of evidence and that she did not think it proper that persons who would know less about the case than the alternates would be the ones deciding it. Plus, she said she had not heard some of the people say much during the time the jurors had spent together; she wondered how they could be expected to speak up in deliberations. The defendants argue that the judge should have questioned the alternate juror about the letter. We don't think that was necessary. The letter does not allege any outside contact with the jurors or untoward improprieties. We have, in fact, read the letter, and to us it seems like the alternate juror was just venting some sour grapes because she was not, after

sitting in on the whole trial, going to get a chance to deliberate.

All of which brings us to sentencing issues. The defendants join in an argument that they should be sentenced under the guidelines for amounts of drugs reasonably foreseeable to them, rather than under the enhanced penalties in 21 U.S.C. § 841(b) for distributing in excess of one kilogram of heroin. The argument is based on the fact that the quantities of drugs distributed were not alleged in the indictment.

We have previously explained why we do not require that the quantities be alleged in the indictment in order for the enhanced penalty provisions to apply. *See United States v. Levy*, 955 F.2d 1098 (7th Cir.), *cert. denied*, 506 U.S. 833 (1992). We pointed out that while defendants are entitled to receive notice of the possibility of an enhanced sentence (and defendants here received notice through a separate notice to them or through pretrial discovery), the notice need not be included in the indictment. The quantity of drugs is a sentencing factor, not an element of the offense. *See United States v. Edwards*, 36 F.3d 639 (7th Cir. 1994). At the sentencing hearing, of course, the defendants must be allowed to contest the quantities of drugs attributed to them. There is no claim here that the sentencing proceedings did not provide them with that opportunity.

Curry's individual challenge to his § 841(b) enhancement is related to his eight prior state court felony convictions for narcotics violations. Prior to trial, the government notified Curry of its intention to seek enhanced penalties pursuant to § 841(b)(1)(A), which provides for a mandatory term of life imprisonment where the defendant has two or more convictions for a felony drug offense at the time he committed the offense for which he is being sentenced. Curry points out, however, that

under the sentencing guidelines he would not receive criminal history points because all eight of his prior state court convictions grew out of what has been alleged as the conspiracy in this case. He argues that therefore they should not be relevant under § 841(b). We rejected a similar argument in *United States v. Garcia*, 32 F.3d 1017 (7th Cir. 1994). Curry attempts to distinguish *Garcia* because Garcia continued to participate in the drug conspiracy after his conviction. Curry claims that following his last state court conviction he entered treatment and ceased his drug activity. His argument loses some force, however, when we remember that before his last conviction he had seven other convictions, which are harder to explain away and which support the draconian enhancement which was correctly applied to him under § 841(b).

Next we go to the issue of drug quantities reasonably foreseeable to certain defendants, pursuant to United States Sentencing Guideline §2D1.1. Lee and Smith both contend that they were held accountable for much larger quantities than they should have been. However, the court clearly articulated its reasons for each calculation as required. *See United States v. Goines*, 988 F.2d 750 (7th Cir. 1993).

Lee was found accountable for 30 kilograms of white heroin and at least 5 kilograms of crack, giving him an offense level of 38. He contends that the judge erred in the calculations of these amounts. We note that the judge would have had to err in both calculations in order for the offense level to be lowered, and the error as to cocaine base would have to be significant. He is eligible for level 38 for distributing either 30 kilograms of heroin **or** 1.5 kilograms of cocaine base.

Specifically, Lee contends that the judge's calculations assume that the heroin packets with which Lee was

involved weighed .15 grams on the average. The judge's estimate—and he is allowed to estimate as we said in *United States v. Acosta*, 85 F.3d 275 (7th Cir. 1996)—is based on all but one of the seizures of heroin made during the course of the conspiracy. The one exception was a seizure on December 12, 1990, from William Johnson; those packets weighed substantially less than the others. Johnson's heroin was not included in the calculations and Judge Holderman did not rely on the weight of these bags, a determination which cannot be said to be erroneous. Johnson, in a recorded conversation with the agent who bought the heroin, said that his heroin was different from Richardson's. The jury apparently believed him and acquitted him of the conspiracy charges in this case. It was not error to refuse to calculate quantities based on Johnson's bags, which were not typical of those sold by the conspiracy.

Lee also contends that Judge Holderman improperly estimated the time during which he was a member of the conspiracy. He argues that he should not be held accountable for any heroin after he ceased being a runner. However, he continued to deal with and sell heroin for the conspiracy. Changing jobs does not remove one from a conspiracy. Further, he contends that it was error to find that 2 months worth of crack sales were reasonably foreseeable to him. We disagree. The record shows that Lee sold crack at the beefstand. He was identified by Cal in a videotape of sales from that location, where large numbers of sales took place in a rather open fashion. It is not error to find that Lee could foresee 5 kilograms of crack sales.

Likewise, Smith contends that the amounts attributed to him were not reasonably foreseeable. Judge Holderman calculated Smith's offense level based on 30 kilograms of brown heroin. The calculation is not clearly erroneous. In addition, however, because Smith had two

felony drug convictions that enhance his sentence under § 841(a)(1), he would be eligible for a life sentence if at least 1 kilogram of heroin or 50 grams of cocaine base were found to be foreseeable to him. Smith said in a tape-recorded conversation with Agent Rotunno that he worked for Tate and Richardson for about 3 years selling heroin and that he made about $50,000. That would mean that Smith personally sold 3.5 kilograms of brown heroin, clearly sufficient to support a life sentence. As it turned out, the government moved for a downward departure, giving the court discretion to impose the sentence of 194 months, which Smith ultimately received.

Palmer raises a different sentencing issue. The court found that he could reasonably foresee 2 months worth of crack distribution from the beefstand, where he personally was selling crack for a 2-month period. Palmer contends that he should receive a reduction of his sentence because he was a minor participant, under §3B1.2(b) of the guidelines. However, finding that Palmer was responsible for 2 months of sales of one of the drugs the conspiracy sold from one of the several locations it used is clearly not holding Palmer responsible for the sales of the broader operation. If the court had held Palmer responsible for all the drugs sold at this spot, his argument would be more persuasive. As it is, the finding already inherently acknowledges Palmer's limited responsibility. It was not error to decline to apply the 2-point reduction he seeks.

Finally, ending our discussion with a whimper, not a bang, we mention Westmoreland's claim that the disparity in sentencing for crack as opposed to cocaine violates the Constitution. The argument has been laid to rest in this court. *See United States v. Lawrence*, 951 F.2d 751 (7th Cir. 1991); *United States v. Booker*, 73 F.3d 706 (7th Cir. 1996).

The convictions and sentences of the defendants are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—11-14-97

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 7, 1998

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Kenneth F. Ripple, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 95-3054 v.	)	No. 94 CR 187
CARMEN TATE, *Defendant-Appellant*	)	**James F. Holderman,** *Judge.*

ORDER

On November 24, 1997, Carmen Tate filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

Exhibit B

Title 21 U.S.C. §848

TATE'S PROPOSED INSTRUCTION NO. 22

To sustain the charge of engaging in a continuing criminal enterprise against Eddie Richardson and Carmen Tate, the government must prove the following propositions with respect to the defendant you are considering:

First, that the defendant you are considering committed at least three violations of the federal narcotics offenses alleged in Count Two of the indictment. You must unanimously agree on which three acts constituted series of violations;

Second, that the defendant committed the offenses acting in concert with five or more other persons. You must unanimously agree on the five persons with whom the defendant committed the violations;

Third, that the defendant acted as an organizer, supervisor or manager of five or more persons; and

Fourth, the defendant obtained substantial income or resources from the offenses.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt with respect to the defendant you are considering, then you should find him guilty of Count Two.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions

Exhibit C

has not been proved beyond a reasonable doubt with respect to the defendant you are considering, then you should find him not guilty of Count Two.

_____ Given

_____ Given as Modified

_____ Refused

_____ Refused as Covered

_____ Withdrawn

United States v. Baker, 10 F. 3d 1374, 1408 (9th Cir. 1993)
United States v. Echeverri, 854 F. 2d 638 (3rd Cir. 1988)

A.

Title 21 U.S.C. §848

TATE'S PROPOSED INSTRUCTION NO. 23

If you find beyond a reasonable doubt, that the government has proved that the defendant committed a continuing series of at least three or more federal narcotics offenses alleged in COunt Two, you must also decide whether the defendant committed this series of offenses acting in concert with five or more persons.

Those persons do not have to be named in the indictment.

You must unanimously agree on which three acts constituted series of violations;

You must unanimously agree on the five persons with whom the defendant committed the violations;

_____ Given

_____ Given as Modified

_____ Refused

_____ Refused as Covered

_____ Withdrawn

United States v. Baker, 10 F. 3d 1374, 1408 (9th Cir. 1993)
United States v. Echeverri, 854 F. 2d 638 (3rd Cir. 1988)

— Exhibit D —

You mt unanimously agree that t. defendant committed at least three federal narcotics offenses. You do not, however, have to agree as to the particular three or more federal narcotics offenses committed by the defendant.

GOVERNMENT INSTRUCTION NO. 46B

United States v. Herrera-Rivera, 25 F.3d 491, 498-99 (7th Cir. 1994)

United States v. Bafia, 949 F.2d 1465, 1470-71 (7th Cir. 1991)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

EDDIE RICHARDSON, Petitioner,

vs.

UNITED STATES, Respondent

CERTIFICATE OF SERVICE

I, William A. Barnett, Jr., an attorney appointed to represent Eddie Richardson under 18 U.S.C. § 3006A, hereby certify that on this 7th day of April, 1998, I caused a copy of the Petition for Writ of *Certiorari* in the above-entitled case to be sent by United States mail, first class postage prepaid, to:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

counsel for respondent.

I further certify that all parties required to be served have thus been served.

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Suite 3600
Chicago, Illinois 60603
(312) 726-4480

Opposition Brief unavailable for filming at this time

(4)

No. 97-8629

In The

Supreme Court of the United States

October Term, 1998

EDDIE RICHARDSON,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed: April 7, 1998
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94 CR 187
RELEVANT CRIMINAL DOCKET ENTRIES

3/23/94	1	INDICTMENT Counts filed against Eddie Richardson (1) count(s) 1, 2, Carmen Tate (2) count(s) 1, 2, 3, Andre Cal (3) count(s) 1, Johnnie Chew (4) count(s) 1, Sectric Curry (5) count(s) 1, Kerry Dockery (6) count(s) 1, Anthony Elliot (7) count(s) 1, Nate Hall (8) count(s) 1, Lydell Johnson (9) count(s) 1, William Johnson (10) count(s) 1, Martell Lee (11) count(s) 1, Rodney Palmer (12) count(s) 1, Michael Sargent (13) count(s) 1, Thaddeus Scott (14) count(s) 1, Lennel Smith (15) count(s) 1, Randy Teague [sic] (16) count(s) 1, Kenny Terrell (17) count(s) 1, Juanita Thomas (18) count(s) 3, Donald Tillman (19) count(s) 1, Joseph Westmoreland (20) count(s) 1, Stanley Westmoreland (21) count(s) 1 (sn) [Entry date 04/04/94]
5/10/95	567	MINUTE ORDER of 5/10/95 by Hon. James F. Holderman as to Eddie Richardson, Carmen Tate, Sectric Curry, Kerry Dockery, Nate Hall, William Johnson, Martell Lee, Rodney Palmer, Lennel Smith, Randy Teagus and Stanley Westmoreland: Jury trial held and continued to 5/11/95 at 9:30 a.m. Jury instruction

conference (informal) held. No notice (dmk) [Entry date 05/12/95]

5/11/95 568 MINUTE ORDER of 5/11/95 by Hon. James F. Holderman as to Eddie Richardson, Carmen Tate, Sectric Curry, Kerry Dockery, Nate Hall, William Johnson, Martell Lee, Rodney Palmer, Lennel Smith, Randy Teagus and Stanley Westmoreland: Jury trial held and continued to 5/15/95 at 9:30 a.m. Formal jury instruction conference held on the record with defendants present. No notice (dmk) [Entry date 05/12/95]

5/18/95 589 MINUTE ORDER of 5/18/95 by Hon. James F. Holderman as to Eddie Richardson, Carmen Tate, Sectric Curry, Kerry Dockery, Nate Hall, William Johnson, Martell Lee, Rodney Palmer, Lennel Smith, Randy Teagus and Stanley Westmoreland: Jury trial held and continued to 5/22/95 at 9:30 a.m. Closin [sic] statements concluded. Jury retires to deliberate the verdict. Trial adjourned; juy [sic] to separate. No notice (pp) [Entry date 05/19/95]

8/24/95 713 SENTENCING ORDER of 8/24/95 by Hon. James F. Holderman: Sentencing Eddie Richardson (1) count(s) 1, 2. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoend [sic] for a term of Life on Count 1 and Count 2 to run concurrently with each other. Defendant

shall receive credit for time served beginning 03/23/94. Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years. The defendant shall pay a fine of $25,000.00. The fine includes any costs of incarceration and/or supervision. Statement of reasons. Mailed notice (dmk) [Entry date 08/28/95]

3/13/97 966 MOTION by Carmen Tate to supplement the record on appeal (pp) [Entry date 03/18/97]

3/17/97 967 SUPPLEMENTAL proposed jury instructions by Carmen Tate (pp) [Entry date 03/18/97]

3/18/97 968 MINUTE ORDER of 3/17/97 by Hon. James F. Holderman as to Carmen Tate: Granting defendant's motion to supplement the record on appeal. [966-1] Ther [sic] Clerk of the District is directed to supplement the record on appeal with "Tate's supplemental proposed instructions" forthwith. Mailed notice (pp) [Entry date 03/18/97]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	94CR0187
	)	Violations: Title 18,
v.	)	United States Code,
EDDIE RICHARDSON,	)	Section 371; Title 21,
also known as "Hi Neef"	)	United States Code,
and "Chief,"	)	Sections 846, 848
CARMEN TATE, also known	)	and 853
as "Red" and "Redman,"	)	
ANDRE CAL,	)	(Filed Mar. 23, 1994)
also known as "Dre"	)	
JOHNNIE CHEW,	)	
also known as "Little Johnnie,"	)	
SECTRIC CURRY,	)	
also known as "Super,"	)	
KERRY DOCKERY,	)	
also known as "Kayro,"	)	
ANTHONY ELLIOT,	)	
also known as "Pretty Boy,"	)	
NATE HALL,	)	
also known as "High Power,"	)	
LYDELL JOHNSON,	)	
also known as "Bo,"	)	
WILLIAM JOHNSON,	)	
also known as "Moyne,"	)	
MARTELL LEE,	)	
also known as "Tell,"	)	
RODNEY PALMER,	)	
also known as "Fat Rodney,"	)	
MICHAEL SARGENT,	)	
also known as "Big Mike,"	)	
THADDEUS SCOTT,	)	
also known as "Thad,"	)	

LENNEL SMITH,	)
also known as "Dusty,"	)
RANDY TEAGUS,	)
also known as "Seemo,"	)
KENNY TERREL,	)
also known as "Cannonball,"	)
JUANITA THOMAS,	)
DONALD TILLMAN,	)
also known as "Disco,"	)
JOSEPH WESTMORELAND,	)
also known as "Smoke," and	)
STANLEY WESTMORELAND,	)
also known as "Sleep" or	)
"General"	)

COUNT ONE

The SPECIAL APRIL 1993 GRAND JURY charges:

1. From in or about 1984 until in or about October 1991, at Chicago and elsewhere in the Northern District of Illinois, Eastern Division,

EDDIE RICHARDSON,
also known as "Hi Neef" and "Chief,"
CARMEN TATE,
also known as "Red" and "Redman,"
ANDRE CAL,
also known as "Dre"
JOHNNIE CHEW,
also known as "Little Johnnie,"
SECTRIC CURRY,
also known as "Super,"
KERRY DOCKERY,
also known as "Kayro,"
ANTHONY ELLIOT,
also known as "Pretty Boy,"
NATE HALL,
also known as "High Power,"

LYDELL JOHNSON,
also known as "Bo,"
WILLIAM JOHNSON,
also known as "Moyne,"
MARTELL LEE,
also known as "Tell,"
RODNEY PALMER,
also known as "Fat Rodney,"
MICHAEL SARGENT,
also known as "Big Mike,"
THADDEUS SCOTT,
also known as "Thad,"
LENNEL SMITH,
also known as "Dusty,"
RANDY TEAGUS,
also known as "Seemo,"
KENNY TERREL,
also known as "Cannonball,"
DONALD TILLMAN,
also known as "Disco,"
JOSEPH WESTMORELAND,
also known as "Smoke," and
STANLEY WESTMORELAND,
also known as "Sleep" or "General"

defendants herein, conspired and agreed with each other, and with others known and unknown to the Grand Jury, knowingly and intentionally to possess with intent to distribute and to distribute quantities of cocaine and cocaine base, Schedule II Narcotic Drug Controlled Substances, and heroin, a Schedule I Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE obtained

wholesale quantities of mixtures containing cocaine, cocaine base and heroin for processing and resale.

3. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE controlled and directed a street gang named the Cicero Undertaker Vice Lords, also known as the "Undertakers." Defendants ANDRE CAL, JOHNNIE CHEW, SECTRIC CURRY, KERRY DOCKERY, ANTHONY ELLIOT, NATE HALL, LYDELL JOHNSON, WILLIAM JOHNSON, MARTELL LEE, RODNEY PALMER, MICHAEL SARGENT, THADDEUS SCOTT, LENNEL SMITH, RANDY TEAGUS, KENNY TERREL, DONALD TILLMAN, JOSEPH WESTMORELAND, and STANLEY WESTMORELAND were members or associates of the Undertakers.

4. It was further part of the conspiracy that the Undertakers were divided into "generations" of members. A generation consisted of a group of persons who were about the same age and became Undertakers at about the same time. Each generation had its own King, Prince and other officers who were answerable to defendants EDDIE RICHARDSON and CARMEN TATE. Defendant WILLIAM JOHNSON was the King of the second generation of Undertakers; defendant KERRY DOCKERY was the King of the third generation of Undertakers; and defendant JOSEPH WESTMORELAND was the King of the fourth generation of Undertakers.

5. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE provided the cocaine, cocaine base and heroin they obtained to the Undertakers and other narcotics distributors.

6. It was further part of the conspiracy that defendants sold user quantities of cocaine, cocaine base and heroin, typically in small packages, commonly referred to as "bags." Twenty or more "bags" were typically bundled into a "pack."

7. It was further part of the conspiracy that defendants and others sold these user quantities of cocaine, cocaine base and heroin in the area of the city of Chicago centered on Cicero Avenue north of the Eisenhower Expressway, an area sometimes called "the Graveyard" (hereinafter "Undertaker Territory"). The Undertakers also sold user quantities of these narcotics in various other areas on the West side of Chicago, as far east as Pulaski Road, as far west as Laramie Avenue, as far south as Taylor Street and as far North as Chicago Avenue.

8. It was further part of the conspiracy that defendants and others sold user quantities of cocaine, cocaine base and heroin, from various locations, also called "spots," within Undertaker Territory and elsewhere. These locations or "spots" included but were not limited to sidewalks, street corners and apartments.

9. It was further part of the conspiracy that at various times defendants ANDRE CAL, JOHNNIE CHEW, SECTRIC CURRY, KERRY DOCKERY, ANTHONY ELLIOT, NATE HALL, LYDELL JOHNSON, WILLIAM JOHNSON, MARTELL LEE, RODNEY PALMER, MICHAEL SARGENT, THADDEUS SCOTT, LENNEL SMITH, RANDY TEAGUS, KENNY TERREL, DONALD TILLMAN, JOSEPH WESTMORELAND, and STANLEY WESTMORELAND assumed various roles in connection

with the sale of cocaine, cocaine base and heroin, including mixing and packaging, cooking cocaine base, transporting the narcotics to the "spots," supervising and conducting narcotics sales from the "spots," collecting the proceeds of the narcotics sales, and transporting the proceeds from the "spots" to other Undertakers, including defendants EDDIE RICHARDSON and CARMEN TATE.

10. It was further part of the conspiracy that the sale of user quantities of cocaine, cocaine base and heroin in Undertaker Territory was subject to the approval of defendants EDDIE RICHARDSON and CARMEN TATE.

11. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE established and enforced rules relating to the sale of user quantities of cocaine, cocaine base and heroin in Undertaker Territory, which rules had the purpose and effect of maintaining the quality, profitability and reputation of such sales within Undertaker Territory.

12. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE enforced and caused the enforcement of the rules relating to the sale of user quantities of cocaine, cocaine base and heroin through a system of punishment known as "violations." A violation consisted of physical punishment of a nature and degree chosen and/or approved by defendants RICHARDSON or TATE or their designees.

13. It was further part of the conspiracy that defendant EDDIE RICHARDSON derived substantial profits from the sale of narcotics in Undertaker Territory and elsewhere, and that RICHARDSON used these profits to

purchase real estate (including 1025 Churchill, Bolingbrook, Illinois and 1720 N. Nagle, Chicago, Illinois), vehicles (including BMWs, Cadillacs, a Chevrolet Monte Carlo, a Jeep Wrangler, Jeep Cherokees, an Oldsmobile Toronado, and a blue Oldsmobile Trofeo), and other assets.

14. It was further part of the conspiracy that defendant CARMEN TATE derived substantial profits from the sale of narcotics in Undertaker Territory and elsewhere, and that TATE used these profits to purchase real estate (including 317 Drake, Bolingbrook, Illinois), vehicles (including BMWs, Cadillacs, and a black Oldsmobile Trofeo), and other assets.

15. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE used various means to conceal their narcotics proceeds from the Internal Revenue Service and the Drug Enforcement Administration, including avoiding the filing of income tax returns, making cash payments in amounts under $10,000, and using nominees to purchase and hold assets.

16. It was further part of the conspiracy that defendants did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden the purposes of acts, and the acts, done in furtherance of the conspiracy, and did use means to avoid detection and apprehension by law enforcement authorities.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. From in or about 1984, to and including October 1991, at Chicago and elsewhere in the Northern District of Illinois, Eastern Division,

EDDIE RICHARDSON,
also known as "Hi Neef" and "Chief," and
CARMEN TATE,
also known as "Red" and "Redman,"

defendants herein, did engage in a continuing criminal enterprise by committing a continuing series of felony violations of Sections 841(a)(1) of Title 21, United States Code, which continuing series of violations was undertaken by defendants in concert with at least five other persons with respect to whom defendants occupied a position as organizer, a supervisory position, and some other position of management, and from which continuing series of violations defendants obtained substantial income and resources.

2. The continuing series of violations undertaken by defendants EDDIE RICHARDSON and CARMEN TATE included:

a. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed cocaine and cocaine base and possessed cocaine and cocaine base with intent to distribute, in

violation of Title 21, United States Code, Section 841(a)(1).

b. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed heroin and possessed heroin with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 848.

COUNT THREE

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. Beginning in or about 1985 and continuing until in or about October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

CARMEN TATE,
also known as "Red" and "Redman," and
JUANITA THOMAS,

defendants herein, did knowingly agree and conspire with each other and with others known and unknown to the Grand Jury, to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of: (a) the Department of the Treasury, in particular the Internal Revenue Service, in the assessment and collection of financial information relating to cash transactions in excess of $10,000, useful in criminal, tax and regulatory

investigations; (b) the Internal Revenue Service and the Drug Enforcement Administration in the identification, seizure and forfeiture of property under the laws of the United States.

2. It was part of the conspiracy that in order to disguise from governmental authorities, including the Internal Revenue Service and the Drug Enforcement Administration, his purchase and ownership of certain real estate, cars and other property using funds derived from the sale of cocaine, cocaine base and heroin, defendant CARMEN TATE arranged for the purchase of real estate, cars and other property by breaking down cash payments into amounts less than $10,000 so that the cash payments would not be reported to the IRS.

3. It was further part of the conspiracy that in order to disguise from governmental authorities, including the Internal Revenue Service and the Drug Enforcement Administration, his purchase and ownership of certain real estate, cars and other property using funds derived from the sale of cocaine, cocaine base and heroin, defendant CARMEN TATE made purchases using the names of other individuals and caused the title to real estate and cars to be placed in the names of other individuals.

4. It was further part of the conspiracy that defendant CARMEN TATE did not file federal income tax returns for the tax years 1984 to the present and had no income reported on Forms W-2 to the Social Security Administration.

5. It was further part of the conspiracy that defendant JUANITA THOMAS made repeated deposits, including cash deposits of less than $10,000, into her bank

accounts for the purpose of disguising the source of funds used to purchase assets for CARMEN TATE.

6. It was further a part of the conspiracy that in or about February 1985, defendant CARMEN TATE purchased a white Cadillac El Dorado at Patrick Cadillac for a total price of $29,395. Defendant CARMEN TATE arranged for the Cadillac to be titled in the other person's name and paid the other person approximately $1,200 for his services.

7. It was further part of the conspiracy that in March and April 1985, defendants CARMEN TATE and JUANITA THOMAS used approximately $76,000 in cash to purchase the property at 317 Drake in Bolingbrook, Illinois. Defendants employed another person to arrange this purchase in such a way as to avoid the filing of forms with the IRS that would have disclosed the use of amounts of cash over $10,000. Defendant CARMEN TATE caused this property to be put in trust for his grandmother.

8. It was further part of the conspiracy that in August 1986, defendants CARMEN TATE and JUANITA THOMAS purchased a beige 1986 BMW model 735 at Patrick Cadillac/BMW for $39,436. Defendants TATE and THOMAS arranged to make the payments in the names of THOMAS and another person and arranged for the BMW to be titled in the other person's name.

9. It was further part of the conspiracy that from about September 1986 to about November 1986, defendants CARMEN TATE and JUANITA THOMAS arranged to purchase 46 N. 52nd Avenue, Bellwood, Illinois using cash and cashier's checks in amounts under $10,000.

Defendants TATE and THOMAS titled the property in the name of another person.

10. It was further part of the conspiracy that in or about December 1987, defendants CARMEN TATE and JUANITA THOMAS purchased a 1988 Jeep Cherokee at Naperville Jeep. Defendants TATE and THOMAS purchased the Cherokee using, in part, a car loan of approximately $16,800 from Clyde Federal Savings. Defendants subsequently made payments on the Cherokee loan to Clyde Federal Savings by purchasing cashier's checks with cash and by making cash deposits under $10,000 into defendant THOMAS' account at Great American Federal Savings, from which Thomas wrote personal checks.

11. It was further part of the conspiracy that in February 1990, defendant CARMEN TATE purchased a black 1990 Oldsmobile Toronado Trofeo and arranged for this car to be titled in the name of defendant JUANITA THOMAS.

12. It was further part of the conspiracy that in June 1990, defendants CARMEN TATE and JUANITA THOMAS purchased a silver 1990 Cadillac Allante in the name of Juanita Thomas. Defendants purchased the 1990 Allante using $9,000 cash, a $5,000 cashier's check purchased with cash and a used 1988 maroon Cadillac Allante.

13. It was further part of the conspiracy that defendant CARMEN TATE purchased other real estate (including 3000 W. Monroe in Bellwood, Illinois), cars and property which he caused to be titled in the names of

other individuals so as to conceal his purchase and ownership of the other real estate, cars and property from governmental authorities, including the Internal Revenue Service and Drug Enforcement Administration.

14. It was further part of the conspiracy that the defendants would and did misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the purposes of the acts done in furtherance of the conspiracy.

OVERT ACTS

15. In furtherance of the conspiracy and to effect the objects thereof, the defendants committed or caused to be committed the following overt acts:

a. On or about February 6, 1985, defendant CARMEN TATE had a meeting at Patrick Cadillac in Schaumburg, Illinois relating to the purchase of a white Cadillac El Dorado.

b. On or about March 21, 1985, defendants CARMEN TATE and JUANITA THOMAS signed a contract to purchase 317 Drake, Bolingbrook, Illinois.

c. On or about March 26, 1985, defendant CARMEN TATE deposited $10,000 cash with a realtor as earnest money towards the purchase of 317 Drake, Bolingbrook, Illinois.

d. In or about March and April 1985, defendant CARMEN TATE made cash payments to a realtor for use in the purchase of 317 Drake, Bolingbrook, Illinois.

e. In or about August 1986, defendant JUANITA THOMAS asked another person to purchase a car for THOMAS in the other person's name.

f. In or about August 1986, defendant JUANITA THOMAS made cash payments at Patrick Cadillac/BMW in connection with the purchase of the beige 1986 BMW model 735.

g. On or about September 12, 1986, defendant JUANITA THOMAS provided a $1,000 check to Davies Realty as part of the purchase price of 46 N. 52nd Avenue, Bellwood, Illinois.

h. On or about December 16, 1987, defendant JUANITA THOMAS signed the bill of sale for a 1988 Jeep Cherokee.

i. On or about May 25, 1988, defendant JUANITA THOMAS signed the bill of sale and title application for a 1988 Cadillac Allante.

j. On or about November 17, 1988, defendant JUANITA THOMAS purchased with cash a $5,000 cashier's check to be used in connection with the purchase of a 1989 Cadillac Seville.

k. In or about February 1990, defendant CARMEN TATE told a car salesman to title a black 1990 Oldsmobile Toronado Trofeo in the name of his girlfriend, Juanita Thomas.

l. In or about February 1990, defendant Juanita Thomas purchased two $5,000 cashier's checks from Great America Federal Savings, which checks were used toward the purchase of black 1990 Oldsmobile Toronado Trofeo.

m. On or about June 2, 1990, defendant JUANITA THOMAS purchased a $5,000 cashier's check with cash from Great America Federal Savings and signed a title application for the silver 1990 Cadillac Allante.

In violation of Title 18, United States Code, Section 371.

FORFEITURE ALLEGATION

1. The SPECIAL APRIL 1993 GRAND JURY realleges Counts One and Two of this indictment as though fully set herein.

2. The SPECIAL APRIL 1993 GRAND JURY further charges that beginning in about 1984 and continuing until at least October 1991, defendants EDDIE RICHARDSON, also known as "Hi Neef" and "Chief," and CARMEN TATE, also known as "Red" and "Redman," did engage in conduct in violation of Title 21, United States Code, Sections 846 and 848, thereby subjecting to forfeiture to the United States, pursuant to Title 21, United States Code, Section 853(a), certain property, including but not limited to the following property and interests:

a. All property constituting or derived from the proceeds the defendants obtained, directly or indirectly, as a result of their violations of Title 21, United States Code, Sections 846 and 848;

b. All property used and intended to be used in any manner or part to commit or facilitate the commission of, their violations of Title 21, United States Code, Sections 846 and 848.

Specifically, such property includes approximately $2,000,000 in United States Currency, in that such sum in aggregate was received in exchange for the distribution of controlled substances, including cocaine, cocaine base and heroin, or is traceable thereto, for which the defendants are jointly and severally liable.

3. If any of the property described as being subject to forfeiture pursuant to Title 21, United States Code, Section 853(a), as a result of any act or omission of the defendants –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value, or;

(5) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendants up to the value of said property forfeitable in paragraph (1) above.

In violation of Title 21, United States Code, Section 853.

A TRUE BILL:

_____

FOREPERSON

_____

UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted In Printing]

Title 21 U.S.C. § 848

TATE'S PROPOSED INSTRUCTION NO. 22

To sustain the charge of engaging in a continuing criminal enterprise against Eddie Richardson and Carmen Tate, the government must prove the following propositions with respect to the defendant you are considering:

First, that the defendant you are considering committed at least three violations of the federal narcotics offenses alleged in Count Two of the indictment. You must unanimously agree on which three acts constituted series of violations;

Second, that the defendant committed the offenses acting in concert with five or more other persons. You must unanimously agree on the five persons with whom the defendant committed the violations;

Third, that the defendant acted as an organizer, supervisor or manager of five or more persons; and

Fourth, the defendant obtained substantial income or resources from the offenses.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt with respect to the defendant you are considering, then you should find him guilty of Count Two.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt with respect to the defendant you are considering, then you should find him not guilty of Count Two.

_____ Given

_____ Given as Modified

_____ Refused

_____ Refused as Covered

_____ Withdrawn

United States v. Baker, 10 F. 3d 1374, 1408 (9th Cir. 1993)

United States v. Echeverri, 854 F. 2d 638 (3rd Cir. 1988)

Title 21 U.S.C. § 848

TATE'S PROPOSED INSTRUCTION NO. 23

If you find beyond a reasonable doubt, that the government has proved that the defendant committed a continuing series of at least three or more federal narcotics offenses alleged in Count Two, you must also decide whether the defendant committed this series of offenses acting in concert with five or more persons.

Those persons do not have to be named in the indictment.

You must unanimously agree on which three acts constituted series of violations;

You must unanimously agree on the five persons with whom the defendant committed the violations;

_____ Given

_____ Given as Modified

_____ Refused

_____ Refused as Covered

_____ Withdrawn

United States v. Baker, 10 F. 3d 1374, 1408 (9th Cir. 1993)

United States v. Echeverri, 854 F. 2d 638 (3rd Cir. 1988)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EXCERPTS FROM TRIAL TRANSCRIPT
UNITED STATES v. EDDIE RICHARDSON, et al.
94 CR 187

[Caption Omitted In Printing]

TRANSCRIPT OF INSTRUCTION CONFERENCE

* * *

[5151] been substituted – well, 29-A, and Tate Instruction No. 5 was the compromise that was reached. I object to the instruction. It has to do with the government's use of cooperating individuals and undercover agents. Your Honor has told the jury during the trial that these are legal means of criminal investigation. I don't believe it should be highlighted in the final word that the jury gets. It seems to me that it gives some sort of an imprimatur to the government's activities, and I think it's inappropriate.

30 and 31 – actually, it's 30-A and 31 – they're on the same page – they were moved into the instructions regarding continuing criminal enterprise right after Government Instruction 39-A. I'd object to the first paragraph, which I guess is 30-A, on the grounds that it is covered by 31, which is also being given, and under the facts of this case, Instruction 31 is the only way in which there was any evidence that Mr. Richardson might have participated in a crime other than as a direct participant.

I object to Government Instruction 46-A and 46-B, which are the unanimity instructions with respect to the continuing criminal enterprise, and I object to the refusal of Tate Instruction No. 22, which I believe –

THE COURT: Counsel may confer.

(Counsel conferring.)

THE COURT: Off the record.

[5152] (Discussion off the record.)

THE COURT: Back on the record.

MR. BARNETT: In addition, Tate proposed Instruction No. 22 will be submitted, and I object to the refusal of that instruction. That would take the place of No. 39-A, as well as No. 46-A and 46-B, and, more appropriately state the law as I believe that it should be. Other than that, I do not have an objection to 39-A, however.

No. 57, which I'm not finding here, but my note is No. 57 is to be given if the defense raises the argument – it's not in the package that's before you –

THE COURT: Yes, is that in a separate –

MR. KRULEWITCH: We'll resubmit that, your Honor. 57-A, I believe it was.

MS. SCOTT: Is that the punishment instruction?

THE COURT: Yes, that's the punishment instruction from the 6th Circuit. It's not in the packet and should not be in the packet, because I don't anticipate giving that unless there is some argument that prompts the need to apprise the jury that it is not the jury's consideration.

MR. BARNETT: All right. I would object to it if it does end up being given, and I would object to having it held over our heads.

THE COURT: All right, I understand your position [5153] on that.

MR. BARNETT: No. 62-A, I don't have an objection to that, but I do have an objection to your refusal of Teagus 1, which I believe is going to be submitted as part of the submissions of refused instructions.

THE COURT: Yes, let me just articulate so the record is clear and so if there's a review I don't want anyone to misinterpret.

All of the instructions that have been submitted and refused at the informal instruction conference, I have requested counsel to resubmit those instructions which they are objecting to the refusal thereof, so that when you say that it will be submitted, it actually already has been submitted and it's been refused off the record and it will be submitted to be made a part of the record. I didn't want any reviewing judge to believe that somehow it wasn't previously submitted, because it was.

You may proceed.

MR. BARNETT: Other than those instructions, Judge, from my notes, I believe that's all I have any objections to. If, during the course of other counsel making their presentations, something arises, I'd ask leave to address the Court again at the end of this, but I don't anticipate that happening.

THE COURT: All right, well, I understand, and, [5154] again, if other counsel make objections that you do not disavow, they inure to the benefit of Mr. Richardson.

MR. BARNETT: Thank you, Judge.

THE COURT: There is one thing I want to mention with each defense counsel, and that is off the record you had indicated you needed three-quarters of an hour. That would be the maximum time that I could accord, or I believe should be accorded.

Do you believe you can do it with less than that?

MR. BARNETT: I don't think so, Judge.

THE COURT: All right, three-quarters of an hour, then, is the allotted amount.

All right, on behalf of the defendant Carmen Tate.

MS. RIVKIN-CAROTHERS: Your Honor, basically, I think that Mr. Barnett covered the objections that we have, but in addition to his comments relative to 39-A and 30-A and 31-A, regarding Tate's proposed Instruction No. 22, we also object to not being allowed to have special interrogatories so that the jury would be required to indicate which three acts they were considering, as well as identifying specifically the five individuals that they had considered in those matters.

Along the same line, we object to 46-A and [5155] 46-B, also because of – based on Tate's proposed Instruction No. 23.

THE COURT: All right, so the record should accurately reflect that you object to the refusal of Tate 23, as well.

MS. RIVKIN-CAROTHERS: Yes.

THE COURT: All right, let me comment on those. I'm refusing Tate 22 and Tate 23 because I believe

the law in the 7th Circuit does not require such a finding. I'm also refusing any proposed special interrogatories that would require the jury to make such a finding. I understand the 7th Circuit law may differ from that of the 9th Circuit, but I believe that the 7th Circuit law is accurately reflected in the instructions that will be given.

All right, as to the other objections that were made previously by counsel – well, let me just comment on a couple of those so that the record is clear, and if counsel want to comment further, they may, but with regard to Government Instruction No. 5, which is 7th Circuit Committee 1.05, I believe that it accurately states the jury's assessment and what the jury should not assess and what should not regard. Counsel may certainly argue that the government failed to prove what the government said it was going to prove in the opening statement, and remind the jury of what the government said in the opening statement.

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EXCERPTS FROM TRIAL TRANSCRIPT
UNITED STATES v. EDDIE RICHARDSON, et al.
94 CR 187

[Caption Omitted In Printing]

TRANSCRIPT OF GOVERNMENT ARGUMENT

* * *

[5377] you is consistent with what was up there, but your recollection is what governs.

Moreover, the Court will tell you to disregard opening statements and closing arguments and other statements of counsel to the extent that they're not supported by evidence. And in opening statements, Ms. Scott indicated that the government might call other witnesses – Anthony Elliot and Kenny Terrel. To the extent we did not call those witnesses and her comments were not supported by the evidence, please disregard those comments. Like the Court, the government asks you to reach your verdict on the evidence presented in this case and nothing else.

And that evidence demonstrates the guilt of every single man. The fact that there is more evidence against some of the defendants is not the relevant inquiry. This is not a comparative where you're scoring who is the most guilty. The only question on each individual defendant is: Has the government sustained the burden beyond a reasonable doubt that he is guilty of the count in Charge 1?

And I submit to you that the evidence with respect to each and every defendant has met that burden.

I'm almost done. I'm going to get to the last two counts of the indictment. I know – I appreciate your hearing with me. It's been a long argument.

Count 2 of the indictment charges Carmen Tate and [5378] Eddie Richardson alone with operating a continuing criminal enterprise, which means essentially they were the leaders and the organizers of the drug operation.

To establish their involvement in that charge, the government must prove four things beyond a reasonable doubt: One, that they committed a series of three or more drug crimes; two, they committed the drug crimes together with five or more persons; three, they were supervisors or organizers of those same five people; and, fourth, that they gained substantial resources from that – made a lot of money, got a lot of drugs.

The two crimes we're talking about are possession of cocaine or heroin with intent to distribute it and the distribution of heroin and cocaine.

Now, with respect to this charge only, Judge Holderman will instruct you that Richardson and Tate don't have to have personally possessed or distributed the drugs. It's enough that they caused other people to do it or that they directed other people to do it.

Thus, for example, if Eddie Richardson and Carmen Tate had Michael Sargent or Martell Lee pass out packs of heroin at Congress and Cicero, they are responsible for those activities. Each time Nate Hall and Rodney Palmer

sold rock cocaine from the beef stand, that's a distribution that was ordered by Eddie Richardson and Carmen Tate and Eddie [5379] Richardson and Carmen Tate are responsible for that.

Now, with respect to those four elements, the evidence overwhelmingly shows it. A continuing series of three. What we are talking about in this case is literally thousands of independent drug transactions. Every time an individual $20 bag of heroin was sold, every time an individual $10 bag of rock cocaine was sold, that is a separate drug crime. And you literally had a series of thousands, and you can rely upon any of those three in reaching your verdict.

Thus, the government has shown a continuing series of literally thousands and the first element with respect to both defendants. Carmen Tate's distribution of powder cocaine at Congress and Cicero. Carmen Tate's distribution of Heroin at Laramie and Van Buren. Eddie Richardson's distribution of heroin at Congress and Cicero. And all throughout Undertaker land, he is responsible for all of that.

Now, with respect to the second element, the evidence is, again, easily shown that both of these men supervised – five? They supervised way more than five men. The evidence has demonstrated the organizational structure of this business involved far more than five that were supervised or organized by Tate and Richardson. Consider the workers. Consider the runners. It's way more than five people.

Each time they called a violation, each time they

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EXCERPTS FROM TRIAL TRANSCRIPT
UNITED STATES v. EDDIE RICHARDSON, et al.
94 CR 187

[Caption Omitted In Printing]

TRANSCRIPT OF JURY CHARGE

* * *

[5781] in Count 1 is an essential element of the crime. Evidence of intoxication from the use of drugs may be sufficient to create a reasonable doubt as to whether the defendant Nate Hall was able to form the requisite intent to commit the crime charged.

Mere addiction to drugs is not a defense to the charge of narcotics conspiracy. However, evidence of intoxication from the use of drugs at the time of the commission of the crime may be sufficient to create a reasonable doubt as to whether the defendant knowingly and intentionally committed the crime charged.

One of the issues in this case is whether the defendant Nate Hall was coerced. A defendant who was coerced must be found not guilty. If the defendant committed the offense charged only because he reasonably feared that immediate serious bodily harm or death would be inflicted upon him if he did not commit the offense and he had no reasonable opportunity to avoid the injury, then he was coerced.

In Count 2 of the indictment, members of the jury, the defendants Eddie Richardson and Carmen Tate are

charged with engaging in a continuing criminal enterprise. Title 21 United States Code section 848 provides, and I quote:

> "Any person who engages in a continuing [5782] criminal enterprise commits a separate offense against the United States."

To sustain the charge in Count 2 of the indictment of engaging in a continuing criminal enterprise against Eddie Richardson and Carmen Tate, the government must prove the following propositions with respect to the defendant you are considering:

> First, that the defendant committed a continuing series of at least three or more of the federal narcotics offenses alleged in Count 2 and at least one of the federal narcotics offenses occurred after the date of March 24, 1989;
>
> Second, that the defendant committed the offense acting in concert with five or more other persons;
>
> Third, that the defendant acted as an organizer, supervisor, or manager of five or more other persons; and
>
> Fourth, that the defendant obtained substantial income or resources from the offenses.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt with respect to the defendant you are considering, then you should find him guilty of Count 2.

If, on the other hand, you find from your consideration of all the evidence that any of these [5783] propositions has not been proved beyond a reasonable doubt with respect to the particular defendant you are considering, then you should find him not guilty of Count 2.

With respect to Count 2, a defendant need not personally perform every act constituting the crime charged. Every person who willfully participates in the commission of a crime may be found guilty. Whatever a person is legally capable of doing, he can do through another person by causing that person to perform the act. If the acts of another are willfully ordered, directed, or authorized by the defendant, then the defendant is responsible for such acts as though the defendant personally committed them.

Title 21 United States Code Section 841(a)(1) provides in relevant part, and I quote Section (a):

> "It shall be unlawful for any person knowingly or intentionally – subsection 1 – to distribute or possess with intent to distribute a controlled substance."

The federal narcotics offenses you may consider in determining whether the defendant engaged in a continuing criminal enterprise include, one, possession of a controlled substance with intent to distribute it, or, two, distributing or causing to be distributed, or aiding and abetting the distribution of, a controlled substance.

[5784] To establish that a defendant you are considering in Count 2 possessed the controlled substance with intent to distribute it, the government must prove the following propositions:

First, that the defendant knowingly or intentionally possessed the controlled substance;

Second, the defendant possessed the controlled substance with the indent [sic] to distribute it; and

Third, the defendant knew the substance was a controlled substance.

Possession may be actual or constructive. Constructive possession is the ability to control the controlled substance.

To establish that the defendant you are considering in Count 2 distributed a controlled substance, the government must prove the following propositions:

First, the defendant distributed a controlled substance;

Second, the defendant did so knowingly and intentionally; and

Third, the defendant knew the substance was a controlled substance.

Distribution is the transfer of possession from one person to another. You must unanimously agree that the defendant acted with and supervised, managed, or [5785] organized five or more persons within the time period charged in the indictment in committing the series of offenses. You do not, however, have to agree on the identity of the five persons with whom the defendant acted, that the five or more persons acted together at the same time, that the defendant personally dealt with them, or that the defendant had the same relationship with each of the five or more persons.

You must unanimously agree that the defendant committed at least three federal narcotics offenses. You do not, however, have to agree as to the particular three or more federal narcotics offenses committed by the defendant.

When the term "substantial" income or resources is used within these instructions, the term, quote, "substantial," close quote, means, quote, "of real worth or importance or of considerable value," close quote. When – the term "resources" is to be interpreted according to its ordinary, contemporary, and common meaning. Money or drugs are both resources within the meaning of the statute. The element of substantial income or resources may be proved through the use of circumstantial evidence.

The terms, quote, "organizer," "supervisor," – oh, let me read that again.

The terms "organizer," "supervisory position," and "any other position of management" are used [5786] in their ordinary meaning in these instructions.

You are instructed, members of the jury, that, as a matter of law, that heroin, cocaine, and cocaine base are controlled substances within the meaning of the statute.

In Count 3 of the indictment defendant Carmen Tate is charged with conspiring to defraud the United States. Title 18 United States Code Section 371 provides in pertinent part, and I quote:

"If two or more persons conspire to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of

the conspiracy, each person commits an offense against the laws of the United States."

To sustain the charge of conspiring to defraud the United States in Count 3 the government must prove the following propositions:

First, that the alleged conspiracy to defraud the United States existed;

Second, that an overt act was committed in furtherance of the conspiracy; and

Third, that an overt act – and, third, – I apologize – and third – the third element is that the defendant knowingly and intentionally became a member of the conspiracy.

* * *

United States District Court
NORTHERN District of ILLINOIS-EASTERN DIVISION

UNITED STATES OF AMERICA V. EDDIE RICHARDSON A/K/A Hi Neef, Chief (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)** Case Number: 94 CR 187-1 William A. Barnett, Jr. Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.
[X] was found guilty on count(s) one and two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which invole the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to possess with intent to distribute cocaine		1
21:848	Continuing criminal enterprise		2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[XX] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) one and two, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 353-50-3057	August 24, 1995 Date of Imposition of Sentence
Defendant's Date of Birth: 2/27/56	/s/ James F. Holderman Signature of Judicial Officer
Defendant's Mailing Address: 71 W. Van Buren St. Chicago, Illinois 60605	JAMES F. HOLDERMAN, U.S. DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Residence Address: 206 N. Keeler 1st Floor Chicago, Illinois 60624	August 24, 1995 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life on Count 1 and Count 2 to run concurrently with each other.

Defendant shall receive credit for time served beginning March 23, 1994.

[X] The court makes the following recommendations to the Bureau of Prisons:

that defendant be incarcerated in a Federal Correctional Institution in an area where defendant may still have contact with his family.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ a.m./p.m. on _____.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not legally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall report in person to the probation office in the district to which the defendant is released

within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess a firearm or destructive device.

Defendant shall not possess any controlled substances.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

the defendant shall not leave the judicial district without the permission of the court or probation officer;

the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

the defendant shall support his or her dependents and meet other family responsibilities;

the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 25,000.00. The fine includes any costs of incarceration and/or supervision.

[X] This amount is the total of the fines imposed on individual counts, as follows:

$25,000.00 on each of counts 1 and 2 to run concurrently with each other.

[X] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[XX] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[X] in installments according to the following schedule of payments:

while incarcerated through the Inmate Financial Responsibility Program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 44

Criminal History Category: III

Imprisonment Range: life to _____ months

Supervised Release Range: 3 to 5 years

Fine Range: $ 25,000.00 to $ 6,000,000.00

[X] Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ N/A

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The court believes that the sentence imposed reflects consideration of the proper sentencing factors.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

_____

DECISION UNDER REVIEW
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES v. EDDIE RICHARDSON, et al.,
NO. 95-3053
130 F.3D 765

In The
United States Court of Appeals
for the Seventh Circuit

Nos. 95-3053, 95-3054, 96-2551, 96-2587, 96-2591, 96-2644, 96-2682, and 96-3197

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDDIE RICHARDSON, CARMEN TATE,
RODNEY PALMER, NATE HALL,
STANLEY WESTMORELAND, MARTELL LEE,
SECTRIC CURRY, and LENNEL SMITH,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinios, Eastern Division.
No. 94 CR 187 – **James F. Holderman**, *Judge.*

ARGUED SEPTEMBER 19, 1997 – DECIDED NOVEMBER 14, 1997

Before BAUER, RIPPLE, and EVANS, Circuit Judges.

EVANS, *Circuit Judge*. It wasn't Alice's Restaurant, but starting in 1990, if it was crack you wanted, you could get it at Highway Beef, a stand at the corner of Gladys and Cicero on the west side of Chicago. During the late

1980's, if it was heroin you wanted, you could get it two blocks away at the Courtway Building on Congress at Cicero. And all the dope came courtesy of a conspiracy involving members of a street gang with a charming name – the Undertaker Vice Lords. The gang operated around Cicero Avenue, near the point where it is bisected by the Eisenhower Expressway.

The operation was put out of business, and on March 23, 1994, a three-count indictment was filed charging conspiracy to distribute narcotics, in violation of 21 U.S.C. § 846; charging two leaders – Eddie Richardson and Carmen Tate – with engaging in a continuing criminal narcotics enterprise, in violation of § 848; and charging Tate and another person with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. A jury trial in the district court involving a gaggle of defendants ran from March 29, 1995, until May 23, 1995, before Judge James F. Holderman; the eight defendants currently before us were found guilty on all the charges against them, although three others who went to trial were acquitted. In addition, one alleged gang member was convicted in a separate trial and several others entered guilty pleas. Sentencings were held over a 1-year period from August 1995 until August 1996. Sectric Curry, Nate Hall, Richardson, and Tate received life imprisonment; Martell Lee and Stanley Westmoreland received 324 months; Rodney Palmer received 292 months, and Lennel Smith 194 months, sentences which vividly show how much society's attitudes about drugs have changed since Alice's time.

The Undertaker Vice Lords were formed in the 1970's by Eddie Richardson. The gang was organized in a hierarchy with five groups of members called "generations"; members of each generation were people of roughly the same age who joined the gang at roughly the same time. Each generation had its own "King" and "Prince." Richardson was the "King of all the Undertakers" and a "Universal Elite" within the Vice Lord Nation. Tate had no rank but was a member whom, it is said, all Undertakers looked up to. The alleged conspirators in this case came from several of the generations and some were leaders of their generations. Richardson was the one who designated who would be a leader. Two members of the fourth generation, Michael Sargent and Johnnie Chew, and a member of the fifth generation, Andre Cal, pled guilty and testified for the government at trial.

The government alleged that Richardson not only controlled the gang but also oversaw the distribution of heroin, crack cocaine, and powder cocaine. Richardson and Tate were said to permit only members of the Undertakers and others granted permission by them to sell drugs in the Undertakers territory. The drugs were sold at well-established drug "spots," and there were established locations for preparing and packaging the drugs. A Chicago Police Department search of one of the latter locations in June 1985 uncovered a kilogram of heroin, irons, mixing bowls, blenders, and strainers. During the search Tate asked the police to let everyone else go because the heroin belonged to him; he said that he bagged it himself because he did not trust his workers. From the packaging locations, runners delivered the drugs to the drug spots and collected the money, and the

workers then sold the drugs. Richardson and Tate enforced the rules regarding drug sales by a system of punishments called "violations." The violations ranged from not being allowed to continue selling, to beatings with bricks, bottles, or ax handles, being stabbed or shot, and even, at least once, to being killed.

The sale of heroin was the primary object of the conspiracy from 1984 until 1990. From 1984 until 1987 brown heroin was distributed out of the Courtway Building in packs which contained 25 $25 packets of user quantities of heroin. For each pack sold, the workers were paid $100, and Richardson and Tate received the balance. From the winter of 1987 until the end of 1988 Chew ran the heroin spot in the Courtway Building. He estimated that during that time, the Undertakers sold a "frame" – 25 packs of 25 bags – every 3 to 4 days, or approximately 25 kilograms of brown heroin. Others selling brown heroin from the Courtway Building included Hall and Westmoreland. Smith also admitted to selling heroin for Richardson and Tate at Cicero and Van Buren and Laramie and Van Buren and, in a tape-recorded conversation, he said he worked for Tate and Richardson from 1985 to 1988, making about $50,000.

In the fall of 1988 Richardson and the Undertakers began to distribute white heroin from the Courtway Building. Chew initially was the runner, followed by Darryl Joyner, Lee, and Sargent. Lee was arrested in January 1989 carrying $2,700 in cash and a beeper. After the arrest, Sargent assumed Lee's responsibilities; Richardson provided Sargent with an average of $40,000 to

$60,000 worth of heroin three times a week. Joseph Westmoreland, who was convicted in a separate trial, estimated that the conspiracy was collecting about $20,000 to $30,000 per day. Based on these statements, the Undertakers sold slightly more than 100 kilograms of white heroin between 1988 and 1990.

Others were also involved in the heroin operation. Curry sold heroin while Sargent was the runner; in fact, Sargent considered Curry his best worker. Curry was arrested in August 1989 and, in a tape-recorded conversation, told an agent that he made more than $50,000 selling drugs for Richardson and Tate. Hall sold heroin from the Courtway Building from May 1988 until December 1988. In a June 1991 conversation with a government agent, Hall confirmed that he was selling heroin for Richardson and that he had been working for Tate and Richardson since 1983. He claims he made approximately $60,000. Lee also was involved in the white heroin trafficking. On October 9, 1990, and November 24, 1990, Lee sold an agent 19 $20 bags of white heroin.

In November 1990 the Undertakers branched into the distribution of crack, primarily from the beefstand at the corner of Gladys and Cicero. Cal testified that he and Tate cooked a quarter kilo of cocaine into crack two to three times a week for 10 months. That would mean that during that time, they sold over 25 kilograms of crack. Curry, Hall, Lee, Palmer, Smith, and Westmoreland each participated in the sale of crack at the beefstand.

Richardson and Tate also oversaw the distribution of powder cocaine. In 1988 Chew became a runner for

cocaine. In addition, Hall, Curry, and Lee were involved in the cocaine operation.

The conspiracy was uncovered when, beginning in 1988, John Rotunno, an agent with the Bureau of Alcohol, Tobacco & Firearms, began an undercover investigation into an illegal gun trade on the west side. In August 1990 he abandoned that investigation and began looking into narcotics sales and street gangs. Posing as the brother of confidential informant Debra Schwede, Rotunno said he was a large marijuana dealer from California who had been arrested by the DEA and was currently on parole. He began to make small purchases of narcotics from low-level members of the gang, who then cooperated with the government.

The facts just recited have been, as required, viewed in the light most favorable to the government. The defendants don't agree. First, they say, this was not one big conspiracy with a monopoly on the Cicero Avenue drug trade. To the extent the defendants sold drugs, they claim to have sold them as members of several smaller conspiracies. Being a member of the Undertakers, they say, does not make one a member of an overarching drug conspiracy. That there is a variance between the indictment and the proof – that is, that there were several smaller conspiracies rather than one large one – is not a novel argument in drug cases, and the law is well-established. We will summarize briefly.

A contention that there were several conspiracies, rather than the one charged, amounts to a "challenge to

the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same conspiracy." *United States v. Townsend*, 924 F.2d 1385, 1389 (7th Cir.1991). The court considers the evidence in the light most favorable to the government, defers to the credibility findings of the jury, and overturns a verdict only when the record contains no evidence from which the jury could find guilt beyond a reasonable doubt. *United States v. Hickok*, 77 F.3d 992 (7th Cir.), *cert. denied*, 116 S.Ct. 1701 (1996).

A conspiracy is a combination of two or more persons joined to further a common purpose or design. *United States v. Shorter*, 54 F.3d 1248 (7th Cir.), *cert. denied*, 116 S. Ct. 250 (1995). To establish that an individual was a member of a conspiracy the government must prove that the individual knew of the conspiracy and intended to join and associate himself with its criminal design and purpose. *United States v. Auerbach*, 913 F.2d 407 (7th Cir.1990). The government need only prove the existence of the conspiracy and a participatory link with each defendant. *United States v. Caudill*, 915 F.2d 294 (7th Cir.1990). The scope of the conspiracy is determined by the scope of the agreement between the defendants. The government must show that a defendant joined the agreement, not the group. The defendant need not have known all the other conspirators nor have participated in every aspect of the conspiracy. A key question is whether the defendants had a mutual interest in achieving the goal of the conspiracy.

The question whether there is one conspiracy or several is a question of fact, which is "something especially within the jury's realm of expertise," and for that reason

the jury "gets first crack" at deciding the issue. *United States v. Paiz*, 905 F.2d 1014, 1019 (7th Cir.), *cert. denied*, 499 U.S. 924 (1990). If the jury is properly instructed on the possible existence of multiple conspiracies, the "finding of a single conspiracy must stand unless the evidence taken in the light most favorable to the government, would not allow a reasonable jury so to find." *United States v. Mealy*, 851 F.2d 890, 898 (7th Cir.1988), quoting *United States v. Urbanik*, 801 F.2d 692, 695 (4th Cir.1986).

It is not relevant that the evidence might also be consistent with an alternate theory; say, that there were multiple conspiracies. Even if the evidence could arguably establish multiple conspiracies, there is no material variance from an indictment charging a single conspiracy. *See Townsend* at 1389.

Applying these principles to this case, we will briefly mention a few minor points raised by the defendants, which need not detain us long. First is the claim that the government somehow confused membership in the Undertakers with an agreement to join the conspiracy. We agree, of course, that the important point is not whether the defendants were Undertakers, nor whether they sold drugs. That they were Undertakers who sold drugs is virtually conceded. The issue is whether they sold drugs as members of the charged conspiracy. There must be evidence that they did if the convictions are to be sustained. We will return in a moment to the question of the sufficiency of the evidence.

Secondly, we note that there is no challenge to the jury instructions which were given, and those instructions properly included instructions – in fact, the defendants' proposed instructions – as to the possibility of multiple conspiracies. The jury was properly instructed and returned its verdict that the eight individuals before us – though not the three it acquitted – were members of one overarching conspiracy. That determination is within the jury's realm of expertise.

Third, the multiple versus single conspiracy issue – which dominates the defendants' arguments – is premised, in part, on the characterization of the government's approach in this case as spinning a huge web and dragging in all sorts of undeserving people. To some degree the argument is one which invokes a sympathetic response. Curry, for instance, was portrayed as a pathetic addict, selling to meet his own needs.

But the argument loses some of its zip when we look at what exactly this conspiracy was all about. It was – as the indictment alleges – a conspiracy to sell on the street, user quantities of narcotics. Except for the leaders, Richardson and Tate, it appears that everyone was, in one way or another, simply a street seller or runner. This indictment did not attempt to show a far-ranging conspiracy involving the importers, the couriers who brought the drugs to Chicago, or the sources from whom Richardson and Tate obtained the drugs. This is a localized, neighborhood operation. What makes it large is the length of time it existed and, partly because of the length of time, the large quantities of drugs distributed. But in some sense, this conspiracy is a small part of what might be a much larger conspiracy.

Having made those preliminary remarks, we turn to the issue at hand. Does the evidence support the existence of one conspiracy? What exactly is the defendants' argument that the evidence is suspect? What was the scope of the agreement? Did the defendants have a mutual interest in achieving a goal?

There seems to be little question that the conspiracy existed from 1984 until 1991 and had three objectives: monopolizing the sale of heroin; monopolizing the sale of crack in 1990 and 1991; and controlling who sold cocaine in Undertaker territory. Each of the defendants had agreements with other members of the group. They worked together as runners and workers to distribute drugs for Richardson and Tate. They worked specific, established spots where drugs were sold. They received a portion of the proceeds as payment for their efforts.

The defendants contend, however, that the government failed to prove that all drug sales within Undertaker territory were performed on behalf of Richardson or Tate; it failed to show a monopoly. The defendants point to evidence of drug sales which were unrelated and say that the government attempted to explain these away as instances in which people were granted permission to sell by Richardson. They seem to argue that the existence of other operations within Undertaker territory means that there were multiple conspiracies.

So, what was the evidence the defendants point to to support their claim that there was not one but multiple conspiracies? Chew, the government witness, said on direct examination that the Undertakers controlled the drug trade and had a policy on violations, but on cross-

examination he said that although he was fired by Richardson for stealing drug money, he himself was never "violated" and continued his drug activities with Tate until he went to work for himself. When he worked for himself he bought cocaine from anyone he could. Andre Cal, who also testified for the government, said that he became a worker for another unrelated street operation conducted by codefendant Lee. There is an allegation about two competing cocaine operations: one run by Tate whose pony packs had staples through them; and one run by Curtis Kirkland, whose packs were marked with red marks. Cal, like Chew, said he was not punished for stealing money from Richardson. Cal also testified that he went into the cocaine business with Anthony Flowers, and later, when Flowers was arrested, Cal became partners with another man named Scott. This drug business was independent of the Undertakers' operation. Sargent, another conspirator who testified, said that there were several other drug operations in Undertaker territory which were not shut down. But he also said that they were not shut down because they were no competition to Richardson's operation.

This in brief is the evidence on which the defendants rely to say that the Richardson-Tate conspiracy was not a monopoly and therefore multiple conspiracies existed. But why do thc defendants see evidence of other independent dealings as fatal to the government's case?

Some of the time, the defendants seem almost to argue that the government is under some obligation to prove a monopoly; if Richardson and Tate did not monopolize the drug trade in Undertaker territory, there was a fatal variance between the government's theory

that they did and the proof at trial which showed some sales which were independent of the conspiracy. We note first that in an ordinary case there is no requirement that a conspiracy achieve some sort of monopoly in order to exist. A conspiracy can exist side by side with another conspiracy. One person can be a member of more than one conspiracy, just as any person can hold down more than one job. *United States v. Blanding*, 53 F.3d 773 n. 2 (7th Cir.1995). It seems clear, however, that disloyalty of this sort to the conspiracy was strongly discouraged in this case. There are many instances of "violations." They range from beatings with bricks, bottles, and sticks to a beating which resulted in death. But again, evidence that a few people did something in violation of the rules without getting punished could be viewed by the jury as something other than evidence that those persons were not members of this conspiracy or that there were multiple conspiracies. Perhaps those people got away with something. The jury in this case was properly instructed as to the possibility of multiple conspiracies and chose to determine that eight of those indicted were members of the charged conspiracy and that three were not.

Other times what the defendants seem to be saying is that the government proceeded on a theory of monopoly and then changed theories midstream – a claim which is relevant also to the discussion that will follow regarding a request for a bill of particulars. By the time we became acquainted with this case, the government's theory was that the Richardson-Tate conspiracy controlled the heroin trade in Undertaker territory. The theory also was that the conspiracy controlled the crack trade in 1990 and 1991 but that the control of cocaine sales was less complete,

and some unconnected sellers were operating either because their sales did not threaten the conspiracy or because Richardson gave them permission to operate. The defendants see this theory as different from the government's theory at the outset of the case.

We are not so sure. The indictment alleged that "the sale of user quantities of cocaine, cocaine base and heroin in Undertaker Territory was subject to the approval of defendants EDDIE RICHARDSON and CARMEN TATE." Now the government is saying that there was control of the heroin and crack markets for periods of time, but that cocaine sales were not so tightly controlled in that other cocaine dealers operated either with approval or because they were not large enough to be a threat. Nothing in that theory is materially inconsistent with the indictment.

Next, the defendants say that the statement in the government's February 21, 1995, proffer also reveals an inconsistency. The statement says that "[u]nder the rules of the gang, no one could sell heroin in Undertaker Territory without the permission of Richardson." We are unable to find an inconsistency between that theory and the one we have been presented.

But the defendants' real contention, we believe, is that the government's theory was that the gang had a monopoly and that therefore anyone who sold drugs in the territory was considered by the government to be a member of this conspiracy, virtually without any other proof. They say:

> As shown at trial, there were numerous people selling drugs within the area established for the single, overall conspiracy charged in the

> indictment who had no agreement with Richardson or Tate. . . . The defendants, in their requests for a bill of particulars, repeatedly objected that the government's true theory was that the charged conspiracy was the gang and membership in the gang amounted to membership in the conspiracy. . . . Furthermore, the government's explanations of "permission" or "no competition" were merely afterthoughts to salvage the indictment once the trial testimony made clear that rather than a single overall conspiracy led by Richardson and Tate, there existed a myriad of independent drug sellers who were operating throughout Undertaker territory – some in virtual head to head competition with each other.

Or as Curry puts it more explicitly, the government's theory was that Richardson and Tate controlled the neighborhood "to such an extent that the only drugs available in that neighborhood came from Richardson or Tate and were sold by gang members."

If the government had relied solely on a syllogism – that Richardson and Tate had a monopoly on drug sales in the Undertaker territory; defendants sold drugs in the territory; therefore defendants sold drugs for Richardson and Tate and were members of the conspiracy – and if there was no other evidence of the connection of the defendants to the conspiracy and further that the premise itself was faulty, the argument would have considerable force. But there was evidence and lots of it. The government presented tape recordings of each defendant except Richardson and Tate – as well as direct evidence of the acts and statements of each of the charged conspirators – sufficient to establish his personal involvement in the

conspiracy. The evidence in this case was clearly sufficient to support the jury's verdict that a single conspiracy existed and that each convicted dealer was a member of the conspiracy.

Palmer, Smith, and Curry argue individually that there is insufficient evidence to link them to the conspiracy. We reject their arguments. Evidence of Palmer's membership includes two sales of crack to Agent Rotunno from the beefstand in November 1990. Plus, Schwede told Rotunno that Palmer was selling crack for the Undertakers and Sargent testified that Palmer sold crack at the beefstand. The beefstand, of course, was an important part of the Richardson operation.

Evidence of Curry's membership came from Cal and Sargent, who identified Curry as a seller of white heroin for the Undertakers and as his best worker. Curry was arrested while selling white heroin at Harrison and Kilpatrick, another of the Undertakers' drug spots. Furthermore, Curry told Rotunno that he had made more than $50,000 selling drugs for Richardson and Tate. In addition, he sold crack from the beefstand and was one of the first workers at the beefstand. On January 14, 1991, Agent Rotunno bought 10 bags of crack from Curry, and in a taped conversation in June of that year Curry confirmed that he still worked for Richardson and Tate. He bragged – though it appears everyone discounts his claim – that he showed the Undertakers how to make rocks from cocaine.

As to Smith, he admitted that he sold drugs for Richardson and Tate for 3 years but claims there is no evidence that he joined the conspiracy. We disagree. He

sold both heroin and crack and he witnessed a "violation." He said on tape that he made roughly $50,000 during the time he worked for Richardson and Tate. There was sufficient evidence for the jury to conclude that he was a member of the conspiracy. We now turn to several pretrial issues.

Curry contends that he is entitled to a new trial because Judge Holderman failed to grant his pretrial and repeated oral motions during trial for a bill of particulars. His argument is that the government changed its theory of this case mid-trial, as we just discussed. The theory at the beginning of trial, Curry says, was that membership in the Undertaker Vice Lords made one a member of the drug distribution conspiracy. When Judge Holderman made clear that theory was not going to work, Curry contends that the government, for the first time, came up with the theory that no one sold drugs in Undertaker territory without Richardson's blessing, and if you sold drugs you thereby joined the conspiracy. In essence, Curry contends that he was involved with Curtis Kirkland, someone who, Curry says, all the government witnesses conceded was not a member of the conspiracy, and that it was this bit of information which caused the government to switch to a permission theory. Curry says he should have been granted his repeated requests for a bill identifying, at a minimum, the alleged conspirators.

The decision whether to require a bill of particulars is within the sound discretion of the trial judge. We will reverse a decision to deny a bill of particulars only when the judge clearly abuses his discretion. A defendant must suffer actual prejudice from the denial. *United States v. McAnderson*, 914 F.2d 934 (7th Cir.1990). But Curry is only

entitled to know the offense with which he is charged, not all the details of how it will be proved. *United States v. Kendall*, 665 F.2d 126 (7th Cir.), *cert. denied*, 455 U.S. 1021 (1981). As we said above, from the indictment Curry was notified of the permission theory. It said that the sale of user quantities of cocaine, cocaine base, and heroin in Undertaker territory was subject to the "approval" of Richardson and Tate. "Approval" and "permission" are words which, in this context, convey the same principle. Judge Holderman, on this point, did not abuse his discretion.

Richardson and Tate each argue that they should have been granted separate trials. Their basic contention is that prejudicial testimony was elicited during the cross-examination of the government witnesses. We note at the outset that most of the testimony would have been admissible in separate trials. Richardson claims that defenses antagonistic to his were presented by Curry, Dockery, and Hall. The three claimed that they were recruited by Richardson, who took advantage of their addictions to get them to sell drugs. In addition, Richardson contends that two pieces of evidence would not have been admitted in a separate trial. One was a tape of a discussion between Agent Rotunno and Curry, in which Rotunno makes a remark about Richardson and Tate being "bad guys." The other is the proffer of Nate Hall, used by the government in its rebuttal case.

Tate makes a similar argument regarding antagonistic defenses; he finds the defenses of Curry, Hall, Palmer, Dockery, and another defendant, Randy Teagus (who was acquitted), were antagonistic to him regarding their claims to be addicts, selling drugs to support a habit. In

addition, Hall, Palmer, and Dockery, Tate claims, solicited testimony that they were subjected to "violations" ordered by Tate and testimony that a drug seller died of a beating. Tate contends that even the government objected to the latter testimony as being prejudicial.

There is a preference in the federal system for joint trials of defendants who are indicted together. Nevertheless, Rule 14 of the Federal Rules of Criminal Procedure allows for an order of severance or other relief which justice may require if a defendant is prejudiced by a joinder with others. In *Zafiro v. United States*, 506 U.S. 534 (1993), the Court concluded that mutually antagonistic defenses are not prejudicial per se. In fact, the Court concluded that a judge should grant a severance only if there is a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." At 539. Even if there is a risk of prejudice, a judge must determine whether it is the type of prejudice that can be cured with limiting instructions to the jury. The decision whether to grant a severance is left to the sound discretion of the trial judge. *Id.*

In this case, the judge declined to order a severance but instructed the jury that it was to give separate consideration to each defendant; that each defendant was entitled to have his case decided on the evidence against him. We, of course, presume that a jury follows the instructions as given. *United States v. Crockett*, 979 F.2d 1204 (7th Cir.), *cert. denied*, 507 U.S. 998 (1992). Furthermore, blame-shifting does not prevent a jury from making a reliable judgment regarding a defendant. *United States v. Ramirez*, 45 F.3d 1096 (7th Cir.1995). And as we said above, the

testimony of the government witnesses, Chew, Cal, and Sargent, of which Tate especially complains, would be admissible in separate trials. As the Court said in *Zafiro*:

> [A] fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant.

At 540. It was not an abuse of discretion to deny the motions for severance.

The defendants also challenge a number of evidentiary rulings. These rulings are reviewed for an abuse of discretion. *United States v. Prevatte*, 16 F.3d 767 (7th Cir.1994); *United States v. Buchbinder*, 796 F.2d 910 (7th Cir.1986); *United States v. Johnson*, 28 F.3d 1487 (8th Cir.), *cert. denied*, 513 U.S. 1098 (1994); *United States v. Davis*, 772 F.2d 1339 (7th Cir.), *cert. denied*, 474 U.S. 1036 (1985).

Nate Hall objects to the exclusion of his expert witnesses. One expert was Dr. Maisha Hamilton-Bennett, who was to testify as to the extent of Hall's drug addiction which he contended went to his coercion defense. The second was Jesse Beckom, who was an expert on gangs. Hamilton-Bennett's testimony was excluded because there was no dispute that Hall was an addict and the defense did not provide timely notice of its intent to call her. In fact, the government received her report over 5 weeks into the trial. Also, other evidence – of which there was plenty – of Hall's addiction was presented to the jury by other witnesses. Beckom's testimony was

excluded on the basis of relevance because he had no familiarity with the Undertaker Vice Lords or its members. We see no abuse of discretion on this point.

Hall also claims that the government should not have been allowed to use his proffer in its rebuttal case. A proffer, of course, is a defendant's (or someone who is hoping not to become a defendant) controlled statement to government agents made to facilitate plea agreements or discussions. Hall entered into a proffer agreement under which the government agreed not to use the information he provided during its case-in-chief. If Hall testified contrary to the agreement, however, or presented a position contrary to the substance of the agreement, all deals were off and the government would be allowed to use his statements against him. This sort of provision is standard fare in pretrial dealings over statements to be offered by defendants.

In Hall's proffer he said he participated in the conspiracy and began selling drugs after being approached by another member of the conspiracy. He said Richardson was the source of the heroin he sold. These statements were interpreted by the government to show that Hall was a willing participant in the conspiracy. At trial, Hall seemed to be trying to set up a defense of coercion. He called a police officer named Rodriguez to testify as to a pat-down of Hall in which drug paraphernalia was found, including a warm crack pipe and an empty bag which had previously contained crack. He was trying to show that he was a drug user and thus that he was coerced into selling drugs. This view of his situation was contrary to the gist of his proffer where he presented

himself as a willing participant in the drug selling conspiracy. Under the circumstances, Judge Holderman didn't even come close to abusing his discretion when he permitted the government to use part of Hall's proffer against him as part of its rebuttal case. And it mattered not at all that Hall didn't personally testify contrary to the proffer because he in effect did the same thing by presenting Officer Rodriguez to the jury. *See United States v. Dortch*, 5 F.3d 1056 (7th Cir.), *cert. denied*, 114 S.Ct. 1077 (1993).

Finally, Carmen Tate argues that the district court improperly admitted evidence of a heroin seizure from him and others in June 1985. Tate claims this was evidence of a prior bad act, requiring analysis under Rule 404(b) of the Federal Rules of Evidence. But the seizure occurred during the existence of the conspiracy and the evidence was admitted pursuant to Rules 401 and 403. We see no abuse of discretion in this ruling.

Curry contends that, given his culpability and the severity of the sentence he was facing, he should have been allowed to tell the jury of his possible punishment during closing argument. Unfortunately for him, arguing punishment to a jury is taboo, as we again recently noted in *United States v. Lewis*, 110 F.3d 417 (7th Cir.1997), *cert. denied*, 66 U.S.L.W. 3258 (U.S. Oct. 7, 1997) (No. 96-9532). Furthermore, there is a difference of opinion regarding Curry's role in this offense. He claims he was a rather pathetic junkie who dealt some drugs to support his habit. Not everyone saw it that way. In his sentencing memorandum Judge Holderman, who saw the evidence firsthand, said Curry was not a minor participant in the conspiracy, but rather that he distributed and foresaw

distribution of at least 30 kilograms of heroin and at least 7.5 kilograms of cocaine base.

All of the defendants contend that the prosecutor improperly vouched for witnesses during her rebuttal argument. The government virtually concedes that the prosecutor's statement was improper but contends that the response was invited by the argument of Curry's defense counsel. The relevant portions of the record are as follows: first, counsel for Curry:

> And I want to talk about one other thing Mr. Krulewitch [AUSA] mentioned. He said to you he represents the people of the United States. I think that was an attempt to somehow bring this home to you. I think it was an attempt to get some sympathy from you. . . .
>
> Mr. Krulewitch doesn't represent the interest of the people of the United States. The people are left to the states. . . .
>
> These people represent the interest of the federal government from Washington. They represent the interests of the federal agencies, like the Internal Revenue Service, like the U.S. Drug Enforcement Administration, like the Alcohol, Tobacco & Firearms. . . . But I do begrudge them trying to turn the war on drugs onto the victims of the war on drugs.

This, the government says, invited its response, given by another AUSA, Zaldwaynaka Scott:

> You heard about the government's witnesses. You heard them called all kinds of things, despicable, ridiculous, and some of the words Mr. Halprin used, I won't even repeat.

> And you heard about Agent Rotunno, you heard about the police officers that were called as witnesses in this case. You heard everybody called a liar. And you heard about what happened from the government's table in this case. The government put these witnesses on. The government called these liars. It's the government's fault.
>
> Well, ladies and gentlemen, if you think that Krulewitch, myself, Agent Hlista, and Agent Zopp went out there, called these people into this courtroom and put on perjured testimony, then you should acquit these men. You should send them home, because we had nothing else better to do with our careers and our lives but put on false testimony[.]

There were objections to these statements, and Judge Holderman gave an instruction to the effect that the opinions of counsel are not evidence. The jury was told to disregard the statement. In his instructions to the jury the judge also stated that it is improper for a lawyer to offer his personal opinions on the credibility of witnesses during an argument to the jury.

We use a two-part analysis in assessing allegations of prosecutorial misconduct in closing argument. First we consider the prosecutor's remarks in isolation to see whether they are improper. We will waste no time on this step; impropriety is virtually conceded. The second step is to consider the remarks in context to see whether they had the effect of denying the defendants a fair trial. We look to the nature and seriousness of the statement; whether it was invited by the conduct of defense counsel; whether the jury was properly instructed to disregard the

statement; whether the defense had an opportunity to counter the statement; and finally we look to the weight of the evidence against the defendants. *United States v. Johnson-Dix*, 54 F.3d 1295 (7th Cir.1995); *United States v. Severson*, 3 F.3d 1005 (7th Cir.1993).

The defendants had no opportunity to counter the prosecutor's statement, and the statement is one of which we disapprove. However, in every other regard, the factors lean against finding that the defendants were deprived of a fair trial. It is at least arguable that it was an invited response in the heat of battle, after several arguments attacking the government case. And also, importantly, the evidence in this case was such that this statement was not needed to put the government over the top. The weight of the evidence is clearly against the defendants. It defies credibility to think that one isolated statement coming at the close of a lengthy trial would sway the jury to cast aside doubts about the veracity of the government witnesses. Finally, the jury was instructed that the remark was improper, and we assume the jury follows instructions given by a judge. It was, to be sure, an improper remark, but another adjective that comes to mind is that it was a stray remark. Coming as it did, at the end of a long trial, with the judge giving a curative instruction, this remark does not make for prejudicial error.

Moving on to jury instructions, we note that Richardson and Tate both argue that it was error for the judge not to give a unanimity instruction to the effect that the jury had to agree on the three federal narcotics offenses constituting the continuing criminal enterprise with which they were charged in count two. The argument is

based on a case from the Court of Appeals for the Third Circuit, *United States v. Echeverri*, 854 F.2d 638 (1988). In *United States v. Kramer*, 955 F.2d 479, *cert. denied*, 506 U.S. 998 (1992), we expressly rejected the result in that case. We see no reason to reconsider *Kramer*.

The defendants also raise an issue regarding improper juror conduct which they say was not adequately investigated by the judge. After the close of the evidence but before closing arguments, an alternate juror wrote Judge Holderman saying that she had some concerns about the regular jurors. She said some of them "appear to be sleeping" during the presentation of evidence and that she did not think it proper that persons who would know less about the case than the alternates would be the ones deciding it. Plus, she said she had not heard some of the people say much during the time the jurors had spent together; she wondered how they could be expected to speak up in deliberations. The defendants argue that the judge should have questioned the alternate juror about the letter. We don't think that was necessary. The letter does not allege any outside contact with the jurors or untoward improprieties. We have, in fact, read the letter, and to us it seems like the alternate juror was just venting some sour grapes because she was not, after sitting in on the whole trial, going to get a chance to deliberate.

All of which brings us to sentencing issues. The defendants join in an argument that they should be sentenced under the guidelines for amounts of drugs reasonably foreseeable to them, rather than under the enhanced penalties in 21 U.S.C. § 841(b) for distributing in excess of one kilogram of heroin. The argument is based on the fact

that the quantities of drugs distributed were not alleged in the indictment.

We have previously explained why we do not require that the quantities be alleged in the indictment in order for the enhanced penalty provisions to apply. *See United States v. Levy*, 955 F.2d 1098 (7th Cir.), *cert. denied*, 506 U.S. 833 (1992). We pointed out that while defendants are entitled to receive notice of the possibility of an enhanced sentence (and defendants here received notice through a separate notice to them or through pretrial discovery), the notice need not be included in the indictment. The quantity of drugs is a sentencing factor, not an element of the offense. *See United States v. Edwards*, 36 F.3d 639 (7th Cir.1994). At the sentencing hearing, of course, the defendants must be allowed to contest the quantities of drugs attributed to them. There is no claim here that the sentencing proceedings did not provide them with that opportunity.

Curry's individual challenge to his § 841(b) enhancement is related to his eight prior state court felony convictions for narcotics violations. Prior to trial, the government notified Curry of its intention to seek enhanced penalties pursuant to § 841(b)(1)(A), which provides for a mandatory term of life imprisonment where the defendant has two or more convictions for a felony drug offense at the time he committed the offense for which he is being sentenced. Curry points out, however, that under the sentencing guidelines he would not receive criminal history points because all eight of his prior state court convictions grew out of what has been alleged as the conspiracy in this case. He argues that therefore they should not be relevant under § 841(b). We

rejected a similar argument in *United States v. Garcia*, 32 F.3d 1017 (7th Cir.1994). Curry attempts to distinguish Garcia because Garcia continued to participate in the drug conspiracy after his conviction. Curry claims that following his last state court conviction he entered treatment and ceased his drug activity. His argument loses some force, however, when we remember that before his last conviction he had seven other convictions, which are harder to explain away and which support the draconian enhancement which was correctly applied to him under § 841(b).

Next we go to the issue of drug quantities reasonably foreseeable to certain defendants, pursuant to United States Sentencing Guideline § 2D1.1. Lee and Smith both contend that they were held accountable for much larger quantities than they should have been. However, the court clearly articulated its reasons for each calculation as required. *See United States v. Goines*, 988 F.2d 750 (7th Cir.1993).

Lee was found accountable for 30 kilograms of white heroin and at least 5 kilograms of crack, giving him an offense level of 38. He contends that the judge erred in the calculations of these amounts. We note that the judge would have had to err in both calculations in order for the offense level to be lowered, and the error as to cocaine base would have to be significant. He is eligible for level 38 for distributing either 30 kilograms of heroin or 1.5 kilograms of cocaine base.

Specifically, Lee contends that the judge's calculations assume that the heroin packets with which Lee was involved weighed .15 grams on the average. The judge's

estimate – and he is allowed to estimate as we said in *United States v. Acosta*, 85 F.3d 275 (7th Cir.1996) – is based on all but one of the seizures of heroin made during the course of the conspiracy. The one exception was a seizure on December 12, 1990, from William Johnson; those packets weighed substantially less than the others. Johnson's heroin was not included in the calculations and Judge Holderman did not rely on the weight of these bags, a determination which cannot be said to be erroneous. Johnson, in a recorded conversation with the agent who bought the heroin, said that his heroin was different from Richardson's. The jury apparently believed him and acquitted him of the conspiracy charges in this case. It was not error to refuse to calculate quantities based on Johnson's bags, which were not typical of those sold by the conspiracy.

Lee also contends that Judge Holderman improperly estimated the time during which he was a member of the conspiracy. He argues that he should not be held accountable for any heroin after he ceased being a runner. However, he continued to deal with and sell heroin for the conspiracy. Changing jobs does not remove one from a conspiracy. Further, he contends that it was error to find that 2 months worth of crack sales were reasonably foreseeable to him. We disagree. The record shows that Lee sold crack at the beefstand. He was identified by Cal in a videotape of sales from that location, where large numbers of sales took place in a rather open fashion. It is not error to find that Lee could foresee 5 kilograms of crack sales.

Likewise, Smith contends that the amounts attributed to him were not reasonably foreseeable. Judge Holderman calculated Smith's offense level based on 30

kilograms of brown heroin. The calculation is not clearly erroneous. In addition, however, because Smith had two felony drug convictions that enhance his sentence under § 841(a)(1), he would be eligible for a life sentence if at least 1 kilogram of heroin or 50 grams of cocaine base were found to be foreseeable to him. Smith said in a tape-recorded conversation with Agent Rotunno that he worked for Tate and Richardson for about 3 years selling heroin and that he made about $50,000. That would mean that Smith personally sold 3.5 kilograms of brown heroin, clearly sufficient to support a life sentence. As it turned out, the government moved for a downward departure, giving the court discretion to impose the sentence of 194 months, which Smith ultimately received.

Palmer raises a different sentencing issue. The court found that he could reasonably foresee 2 months worth of crack distribution from the beefstand, where he personally was selling crack for a 2-month period. Palmer contends that he should receive a reduction of his sentence because he was a minor participant, under § 3B1.2(b) of the guidelines. However, finding that Palmer was responsible for 2 months of sales of one of the drugs the conspiracy sold from one of the several locations it used is clearly not holding Palmer responsible for the sales of the broader operation. If the court had held Palmer responsible for all the drugs sold at this spot, his argument would be more persuasive. As it is, the finding already inherently acknowledges Palmer's limited responsibility. It was not error to decline to apply the 2-point reduction he seeks.

Finally, ending our discussion with a whimper, not a bang, we mention Westmoreland's claim that the disparity in sentencing for crack as opposed to cocaine

violates the Constitution. The argument has been laid to rest in this court. *See United States v. Lawrence*, 951 F.2d 751 (7th Cir.1991); *United States v. Booker*, 73 F.3d 706 (7th Cir.1996).

The convictions and sentences of the defendants are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court of the United States

No. 97-8629

Eddie Richardson,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: "Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the 'series of violations' required for conviction for conducting a continuing criminal enterprise in violation of U.S.C. § 848."

October 5, 1998

(5)

No. 97-8629

In The

Supreme Court of the United States

October Term, 1998

EDDIE RICHARDSON,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the Fifth Amendment and the Right to Trial by Jury guaranteed by the Sixth Amendment require that the jury be instructed that it must unanimously agree as to the commission by the defendant of each of three predicate narcotics violations in order to find that the defendant engaged in a continuing criminal enterprise as prohibited by 21 U.S.C. § 848.

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BASIS FOR JURISDICTION

The case below involved a criminal prosecution of 11 defendants, including Petitioner Eddie Richardson ("Richardson"). Richardson was charged in Counts One and Two of the Indictment with violations of 21 U.S.C. §§ 846 and 848. The jurisdiction of the District Court was pursuant to 18 U.S.C. § 3231.

On May 23, 1995, the trial jury found Richardson guilty on Counts One and Two of the indictment.

On August 24, 1995, Richardson was sentenced to life imprisonment on each of Counts One and Two, to be served concurrently, plus five years of supervised release to be served thereafter. Richardson remains in federal custody serving the imposed sentence.

Richardson filed a timely notice of appeal on August 25, 1995. The U.S. Court of Appeals for the Seventh Circuit had jurisdiction over Richardson's direct appeal pursuant to 28 U.S.C. § 1291.

The Seventh Circuit's order affirming the Petitioner's conviction and sentence was entered on November 14, 1997. The Seventh Circuit denied a petition for rehearing with suggestion for rehearing *en banc*, filed by one of Petitioner's co-defendants, on January 7, 1998.

Petitioner timely filed a Petition for Writ of *Certiorari* on April 7, 1998. This Court has exercised its jurisdiction to review the Seventh Circuit's affirmance of Petitioner's conviction by issuing a writ of *certiorari* pursuant to 28 U.S.C. § 1254 on October 5, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

No person shall be . . . deprived of life, liberty, or property, without due process of law

. . .

Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

. . .

B. STATUTORY PROVISION INVOLVED

Title 21, United States Code, § 848

(a) Penalties; forfeitures.

Any person who engages in a continuing criminal enterprise shall [be guilty of an offense]

. . .

(c) "Continuing criminal enterprise" defined.

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

. . .

C. RULE INVOLVED

Rule 31, Federal Rules of Criminal Procedure

Rule 31. Verdict

(a) Return. The verdict shall be unanimous . . .

STATEMENT OF THE CASE

This petition arises out of the conviction and sentencing of Petitioner Eddie Richardson for conspiracy to possess with intent to distribute and to distribute quantities of cocaine, cocaine base and heroin, as well as for engaging in a continuing criminal enterprise ("CCE") involving that same conspiracy. After a seven-week trial, Richardson was found guilty by a jury of both the conspiracy

and the CCE. On August 24, 1995, Judge Holderman sentenced Richardson to life imprisonment and a fine of $25,000 on each of Counts One and Two of the Indictment to be served concurrently. (Record 713, J.A. 39).

With respect to the CCE (Count Two of the Indictment), codefendant Carmen Tate submitted, and Richardson adopted two alternative instructions which would have required the jury to agree unanimously that Richardson had committed three predicate federal narcotics offenses, as well as to agree unanimously as to which three actions constituted those federal narcotics offenses. (J.A. 21-23). The court refused those instructions, and instead gave the government's proposed instruction and instructed the jury that they did not "have to agree as to the particular three or more federal narcotics offenses committed by the defendant." (J.A. 37, Tr. 5785).

The court's refusal of Tate's proposed instructions and charge to the jury that they did not have to agree as to the particular federal narcotics offenses upon which the CCE count was predicated denied Richardson his right to due process guaranteed by the Fifth Amendment to the Constitution and his right to a unanimous jury verdict guaranteed by the Sixth Amendment as well as Rule 31(a) of the Federal Rules of Criminal Procedure.

SUMMARY OF THE ARGUMENT

The trial court's refusal of Petitioner's requested instruction that the jury must find unanimously that Petitioner committed each of three predicate narcotics felonies in order to convict under the continuing criminal

enterprise statute violated Petitioner's right to jury specificity as to a necessary element of the offense. Jury specificity is required under the Fifth and Sixth Amendments as to each element of the offense charged. The predicate narcotics felonies constituting the continuing series are necessary elements of a continuing criminal enterprise offense requiring the jury's agreement as to their commission.

The legislative intent to require the predicate felonies to be proved particularly can be ascertained both by an examination of the language of the statute and by reading the legislative history. The statute on its face requires proof of at least one narcotics felony in particular, and also a continuing series of such felonies related to that one. A common sense reading of the statute suggests that a series of three related felonies must be agreed to unanimously to obtain a conviction. The legislative history reinforces this interpretation because the concerns expressed in connection with the passage of the CCE statute indicate a great sensitivity to the Due Process requirement that every element of the continuing criminal enterprise be proved.

Due Process requires that the statute be read to require juror unanimity as to each of the predicate felonies. Due Process requires fundamentally that an individual be charged with enough specificity to understand the nature of the charges. As a corollary, the jury must not be confused as to what the charges are, and the jury's verdict must reflect unanimous agreement as to the set of facts constituting the offense charged. In the context of a CCE prosecution, this means the jury must unanimously agree to the commission of each of at least three narcotics

offenses in order to find a continuing series of such offenses.

The trial court's failure to properly instruct the jury in this case was not harmless error. The instruction that the jury need not find unanimously as to the three predicate felonies rendered its verdict meaningless. The reviewing court can only guess as to what the verdict might have been had the jury been properly instructed.

Accordingly the Petitioner's CCE conviction should be reversed and remanded.

ARGUMENT

A. STATEMENT OF FACTS.

Richardson was charged, along with nineteen other individuals, in a three-count indictment alleging an extensive narcotics conspiracy spanning a period of approximately seven years in violation of 21 U.S.C. § 846. No overt acts were alleged. Essentially Richardson and a codefendant Carmen Tate were accused of controlling and directing a street gang by the name of the "Cicero Undertaker Vice Lords" which was accused in general terms of engaging in the business of selling heroin, cocaine and crack cocaine. (Record 1, J.A. 5-10). Richardson and Tate were also charged in a second count with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. (Record 1, J.A. 11-12).[1] The "predicate

[1] The indictment also charged Carmen Tate and Juanita Thomas in a separate count with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. Additionally the indictment contained certain "Forfeiture Allegations" (Record 1, J.A. 18), which were dismissed by the government as to Richardson after the return of the verdict. (Record 601).

narcotics offenses"[2] were alleged generally as the repeated distribution and possession with intent to distribute cocaine, cocaine base and heroin over the seven year period between 1984 and 1991.[3] No specific incidents of such

[2] Section 848(c) defines the offense in pertinent part as follows:

> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

[3] Count Two of the indictment alleges in part:

> The continuing series of violations undertaken by defendants EDDIE RICHARDSON and CARMEN TATE included:
>
> a. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be

sales or possessions were alleged, nor were any substantive counts of sales or possession included in the indictment.

Trial was held over a period of seven weeks, and Richardson was found guilty of both the narcotics conspiracy and engaging in a continuing criminal enterprise. (Record 602). At trial, the government relied on three cooperating codefendants, Andre Cal, Michael Sargent and Johnnie Chew, to provide the only testimony directly implicating Richardson in narcotics sales. Their testimony was of a general nature, broadly describing a course of criminal conduct spanning seven years.[4]

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distributed cocaine and cocaine base and possessed cocaine and cocaine base with intent to distribute, in violation of Title 21, United States Code Section 841(a)(1).

b. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed heroin and possessed heroin with intent to distribute, in violation of Title 21, United States Code Section 841(a)(1).

(Record 1, J.A. 11-12).

[4] The following colloquy between the prosecutor and Johnnie Chew is an example of the nature of this testimony:

Q. While you were an Undertaker, did you ever sell narcotics?

A. Yes, sir.

Q. When did you begin to sell narcotics?

A. In 1985.

Q. What types of narcotics did you sell?

A. Codeine syrup.

The government called numerous police officers to testify about drug arrests of Richardson's codefendants. None of these officers had ever arrested Richardson and some had never even seen him in their years of patrolling the area allegedly controlled by the Undertakers. Officer Robert Rodriguez had never arrested or stopped Richardson. [Tr. 2072]. Sergeant Richard Elmer, who had worked in the geographic area for 16 years up to 1990, and conducted "aggressive patrols" looking for drug dealing, had never arrested Richardson. [Tr. 2283]. Officer Timothy Cerven never arrested Richardson. [Tr. 2302]. Likewise Officer Frank Esposito [Tr. 2322], Officer Wayne Frano [Tr. 2354], Officer Gregory Kooyumjiam [Tr. 2365], Officer Edward Mizera [Tr. 2377], Officer Luis Munoz [Tr. 2414], Officer Robert Rutherford [Tr. 2426], Officer Carlos Velez [Tr. 3918], and Officer Israel Pacheco [Tr. 2439].

Q. From what location did you sell codeine syrup?

A. Washington and Leclaire.

Q. Do you know who ran the spot located at Washington and Leclaire?

A. Christopher Raspberry.

. . .

Q. How often did you sell codeine syrup at that spot?

A. I sold there every day during the time we was working, every day.

. . .

Q. Approximately when did you stop selling at this location?

A. Early, I think, January of '86.

(Tr. 206-209).

The government also called agents of the federal Drug Enforcement Administration and Bureau of Alcohol, Tobacco and Firearms who had spent approximately three years investigating the Undertakers with a view to proving that Richardson was the ringleader. [Tr. 3789]. Agent William Zopp testified that in his three years on the case, he could not locate Richardson. [Tr. 3789].

With respect to the CCE charge, codefendant Tate submitted, and Richardson adopted two alternative instructions which would have required the jury to agree unanimously that Richardson had committed three predicate federal narcotics offenses, as well as to agree unanimously as to which three actions constituted those federal narcotics offenses. (J.A. 21-23). The court refused those instructions, and instead gave the government's proposed instruction and instructed the jury that they did not "have to agree as to the particular three or more federal narcotics offenses committed by the defendant." (J.A. 37, Tr. 5785). In reliance on that ruling by the court, the prosecutor argued that the jury could rely on any three of thousands of independent drug transactions.[5]

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[5] The prosecutor stated:

> Now, with respect to those four elements, the evidence overwhelmingly shows it. A continuing series of three. What we are talking about in this case is literally thousands of independent drug transactions. Every time an individual $20 bag of heroin was sold, every time an individual $10 dollar bag of rock cocaine was sold, that is a separate drug crime. And you literally had a series of thousands, and you can rely upon any of those three in reaching your verdict. (Tr. 5379, J.A. 31).

B. LEGAL ARGUMENTS

1. There Is a Split in the Circuits Regarding Jury Specificity as to the Predicate Narcotics Offenses Necessary to a CCE Conviction.

The court's instruction that the jury did not have to agree as to the predicate offenses making up the continuing series of violations, coupled with the prosecutor's invitation to rely on any three of thousands of offenses alleged to have occurred over the years, resulted in a probability that the jury returned a "patchwork verdict" in this case.[6] This case accordingly presents squarely the issue as to whether the Due Process Clause and the Sixth Amendment require juror unanimity as to each of three or more violations alleged to constitute a "continuing series" of violations under the CCE statute.

In 1970, this Court held that due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [a defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Since then, this Court, as well as the lower courts, have wrestled with defining what is a "fact necessary to constitute the crime." Historically it has been long recognized that the means by which a particular crime is committed

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[6] A "patchwork verdict" results from piecing together the jurors' different conceptions of the predicate acts that satisfy the continuing series element of the offense. Eric S. Miller, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 Yale L.J. 2277, 2282 (1995).

are immaterial.[7] This precept has been codified at Rule 7(c)(1), Federal Rules of Criminal Procedure, which allows charging in an indictment that the means of commission of the crime are unknown or that it was commited by one or more specified means. The question then becomes whether a fact is a mere means of commission of an offense or whether it is elemental to the offense.

In the context of the CCE statute, 21 U.S.C. § 848, definition of the necessary factual elements has resulted in disagreement among the federal circuits as to the nature of the offenses constituting the predicate "continuing series of violations" necessary to a violation of the statute. In *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988), the Third Circuit has held that each member of the series is a factual element of the offense as to which the jury must agree. In *United States v. Canino*, 949 F.2d 928 (7th Cir. 1991), the Seventh Circuit has held to the contrary, finding that the frequency of offenses, sufficient to constitute a "series," is the element to be found by the jury, leaving the determination of which offenses made up that number to the individual jurors. This Court has not addressed the issue of jury specificity in the context of a CCE prosecution previously, but its decision in *Schad v. Arizona*, 501 U.S. 624 (1991), offers some guidance in analyzing the issue in a somewhat similar context.

In *Schad, supra,* the issue presented was whether a first-degree murder conviction under jury instructions

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[7] *Andersen v. United States*, 170 U.S. 481 (1898) (The government was not required to prove that a death had occurred by shooting or drowning in order to sustain a murder conviction where the defendant was responsible for either).

that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional.[8] While the Court characterized the issue as a due process right rather than one under the Sixth Amendment's guarantee of a unanimous verdict[9], the Court also concluded that the distinction is "immaterial to the problem of how to go about deciding what level of verdict specificity is constitutionally necessary."[10] As the plurality put it, the issue was "what the jury must be unanimous about" or, more formally, "the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions."[11]

2. The Legislative Intent as Reflected in the Statutory Language and Legislative History Was to Require Juror Unanimity as to the Predicate Offenses.

The Court recognized in *Schad, supra,* that "[d]ecisions about what facts are material . . . and therefore must

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[8] A second issue, whether defendant was entitled to a lesser included offense instruction, is irrelevant to the case now before the Court.

[9] Although the Sixth Amendment does not explicitly require unanimous verdicts, this Court has long recognized that the Sixth Amendment implicitly guarantees the right thereto in federal criminal cases. *Johnson v. Louisiana*, 406 U.S. 356, 370 (1972) (Powell, J., concurring). This right has been explicitly codified in Rule 31(a), Fed.R.Crim.P.

[10] *Schad v. Arizona*, 501 U.S. at 634 n.5. In *Schad*, the jury was instructed that its verdict must be unanimous, eliminating the need to decide whether the Sixth Amendment guarantee of a unanimous verdict should be applied to the states through the Fourteenth Amendment's provisions.

[11] *Schad, supra,* at 631.

be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court."[12] Therefore the legislative intent is the first question to be addressed.[13]

The CCE statute was drafted as part of the Drug Abuse Prevention and Control Act of 1970.[14] The CCE specifically targeted those persons within a narcotics operation holding a position of management and authority, the "top brass."[15] The legislative history indicates that the CCE was not aimed at "the casual drug user," but rather the "professional criminal."[16] The penalties for a violation of the CCE are accordingly harsh, including mandatory minimum sentences of at least twenty years[17], and in some cases, life imprisonment[18] or the death penalty.[19]

The statutory requirements for a conviction under the CCE are set forth at section 848(c) thereof. A predicate

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[12] *Schad, supra,* at 638.

[13] *See United States v. Edmonds,* 80 F.3d 810, 815 (3d Cir. 1996) (*en banc*). In *Edmonds*, the Third Circuit, sitting *en banc*, reiterated its holding in *United States v. Echeverri,* 854 F.2d 638 (1988), after reexamining the issue in light of *Schad, supra.*

[14] Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-971) (1988).

[15] *Garrett v. United States,* 471 U.S. 773, 781 (1985).

[16] 116 Cong. Rec. 33, 631(1970).

[17] 21 U.S.C. § 848(a) (1988).

[18] *Id.* § 848(c).

[19] *Id.* § 848(b).

offense, defined as a violation of any of the federal narcotics statutes the punishment for which is a felony,[20] must have been committed as part of a "continuing series" of such violations.[21] Additionally the "continuing series" must have been committed in concert with five or more other individuals as to whom the defendant exercises a management role, and the defendant must have derived substantial income or resources therefrom.[22]

The language of the statute itself provides an indication that the legislature intended that each violation comprising the "continuing series" be considered an element of the offense.[23] The definition of the offense states initially that

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[20] The prohibited drug-related acts are found in §§ 841(a), 842(a) and 960(a).

[21] 21 U.S.C. § 848(c)(2). The circuits are not unanimous in defining the number of violations necessary for establishing a "continuing series." The majority of the circuits addressing the issue have held a "continuing series" to be three or more violative acts. *United States v. Echeverri,* 854 F.2d 638, 642 (3d Cir. 1988); *United States v. Young,* 745 F.2d 733, 747 (2d Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985); *United States v. Hernandez-Escarsega,* 886 F.2d 1560, 1570 (9th Cir. 1989), *cert. denied,* 497 U.S. 1003 (1990). The Seventh Circuit, on the other hand, has held that only two predicate offenses are required. *United States v. Baker,* 905 F.2d 1100, 1102-05 (7th Cir. 1990), *cert. denied,* 498 U.S. 876 (1990). The issue did not arise in this case because the court instructed the jury that three offenses were required to establish a "continuing series." (Tr. 5785, J.A. 34).

[22] 21 U.S.C. § 848(c)(2)(A) and (B). *See* Note 2 *supra.*

[23] This view is discussed at greater length in CyrusAmir-Mokri, Comment, *Predicate Offenses and Jury Agreement Under the Continuing Criminal Enterprise Statute,* 1994 U.of C. Legal F. 325, 337-339.

> a person is engaged in a continuing criminal enterprise if . . . he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony. . . . [24]

The statute continues by providing that, in addition, the violation must be "part of a continuing series of violations. . . . "[25] Therefore on its face the statute requires that the jury find that the defendant committed a substantive drug violation, and that that violation was part of a continuing series of such violations.[26] At the very least, this would suggest that the jury must agree that a defendant committed at least one specific predicate offense.[27]

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[24] 21 U.S.C. § 848(c).

[25] *Id.*

[26] *See Garrett v. United States*, 471 U.S. 773, 786 (1985).

[27] It should be noted that the Third Circuit does not seem to agree with this analysis. In *United States v. Edmonds, supra,* the court in attempting to interpret the statute, stated:

> The statute lends itself to either interpretation. On the one hand, the statute is triggered by violation of *"any* provision" as part of a "continuing *series* of violations." By placing no emphasis on the particular, the statute could be read to say that different routes of violation are fungible alternatives, suggesting that the provisions are mere "means."

80 F.3d at 817. This ignores the fact that the trigger is a discrete *violation,* not the provision violated, emphasizing the particular, contrary to the court's analysis. The court, however, also recognized that the predicate violations are recognized by Congress as separate offenses, ultimately finding the language of the statute inconclusive.

Logic suggests that the jurors must also agree on the other offenses that constitute the "continuing series."[28] It would be illogical to interpret one part of the statute to require specific agreement over one predicate act, but to interpret "continuing series" not to require specific agreement over the other predicate acts. Such an interpretation would suggest that a "continuing series" can be proved even if a jury agrees on only one predicate offense. Since there is no difference in definition between the one specific violation which must be proved and the other predicate violations comprising the "continuing series," it would not make sense to distinguish between them as to the level of jury certainty required.

Furthermore, the use of the term "continuing series" suggests that specific jury agreement should be required. The term is not defined in the statute, but the courts have uniformly interpreted it to require proof of a specific minimum number of related violations, in most cases three.[29] Common sense suggests that the jury must agree as to the three predicate acts comprising the "continuing series." If the jurors disagree over the predicate acts, the

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[28] The requirement of a "continuing" series has led some courts to require that the predicate offenses be found to be related. *See United States v. Jones,* 801 F.2d 304, 307 (8th Cir. 1986); *United States v. Baker,* 905 F.2d 1100, 1104 (7th Cir. 1990).

[29] *United States v. Young,* 745 F.2d 733, 747 (2d Cir. 1984). The Seventh Circuit is an exception and requires only two predicate offenses. *United States v. Baker,* 905 F.2d 1100, 1105 (1990). In the case before the Court, the trial judge nevertheless instructed the jury that it must find three predicate offenses. This Court, without addressing the issue directly, appears to have adopted the three-offense requirement in *Garrett v. United States, supra,* 471 U.S. 773, at 788, 804.

predicate acts themselves have not been individually proven. And because a "series" is made up of a number of individual acts, proof of a "series" should require proof of each of the constituent acts.

Furthermore the CCE statute, although similar in some respects to a conspiracy statute, requires more than just an agreement to commit an unlawful act.[30] It requires the actual commission of a predicate violation which is part of a continuing series of violations. The predicate violations, unlike mere overt acts in furtherance of a conspiracy, are themselves, by definition, viewed as separate and distinct offenses by Congress. This would suggest that they are not merely alternative means of committing a crime nor immaterial acts as to which the jury need not concur.[31] If a defendant is charged with such a violation in a separate count, the jury must return a unanimous verdict in order to convict. To impose a lessser standard for conviction under the harsher CCE statute, where a continuing series is required, makes for an anomalous result.

The legislative history also supports the conclusion that Congress intended the predicate acts to be individually proven. This Court has had occasion to examine that history in *Garrett v. United States*, 471 U.S. 773, 782-784 (1984), concluding that the CCE statute was intended to be a separate and distinct offense from the underlying

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[30] *See United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981).

[31] The Third Circuit found this suggestive that Congress intended the predicate offenses to be elemental. *United States v. Edmonds, supra*, at 817-818.

predicate violations, and not just a sentencing enhancement statute for recidivists.

H.R.18583 is the bill that was enacted to become the Comprehensive Drug Abuse Prevention and Control Act of 1970. As originally introduced in the House, H.R. 18583 had a section entitled "Continuing Criminal Enterprises" which in reality was a recidivist provision which provided for enhanced sentences for an individual who committed a drug felony as part of a pattern of criminal conduct. Representative Dingell proposed an amendment, which was ultimately passed as § 848, addressing concerns about the lack of due process in the fact finding under the proposed recidivist provision. The amendment made engaging in a CCE "a new and distinct offense with all of its elements triable in court."[32]

The comments of Representative Eckhardt illustrate the concerns of certain members of the Congress regarding the statute's impact on due process rights. While criticizing the recidivist approach, he stated, "[b]ut we would be making a terrible mistake if, because of its emotional impact, we should throw away the due process of law."[33] He supported the Dingell amendment's approach, which assured that "if you are going to prove a man guilty, you have to come into court and prove every element of the continuing criminal offense."[34] This focus on proof of "every element" of the continuing criminal

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[32] H.R. Rep. No. 91-1444, pt. 1, pp. 83-84 (1970) (additional views).

[33] 116 Cong. Rec. 33,631 (1970) (remarks of Rep. Eckhardt).

[34] *Id.*

offense, in contrast to the less rigorous proof required under the provisions under discussion in the recidivist provision, suggests strongly that the Congress perceived and intended the Dingell amendment to require proof of each particular predicate felony constituting the continuing offense.

The Seventh Circuit, it should be noted, found the legislative history to support a construction of the statute requiring no jury agreement as to the predicate felonies. This finding was premised upon the view that requiring juror unanimity as to the predicate acts "will result in unjustified acquittals frustrating the important policy goals of the CCE." *United States v. Canino*, 949 F.2d 928, 948 (1991). This concern about "unjustified acquittals" is certainly not reflected however in the remarks of the proponents of the Dingell amendment which ultimately became the law. The Seventh Circuit, rather than acknowledging the intent of the Dingell amendment to require proof of every element of the continuing criminal offense," concluded that a conviction is justified "when the jury has a unanimously agreed sense *that* the defendant exhibited such conspiratorial frequency rather than a shared sense of *what* those acts may have been." *United States v. Canino, supra*, 949 F2d 928, 948 n. 7. It is impossible to reconcile a requirement of proof of every element with a requirement that the jury only have an agreed "sense" as to those elements. This suggests the Seventh Circuit has misconstrued the legislative history and intent.

The statute on its face suggests that the predicate narcotics felonies were intended by Congress to be proven as elements of a CCE violation. The remarks of

the members of Congress in the debates prior to the passage of the statute make clear that rigorous proof of the elements of a CCE violation was intended because of the due process concerns. Accordingly, while admittedly not as clear as it might have been, the Congress has evidenced an intent that the statute should be interpreted to require jury agreement as to the specific predicate offenses.

3. Due Process Requires Juror Specificity as to the Predicate Narcotics Violations.

While legislative intent, to the extent discernable, is to be honored by the courts in construction of a statute, Due Process concerns place some limits on the legislature's power to define different courses of conduct as merely alternative means of committing a single offense.[35] Accordingly even if it were determined that the Congress, in enacting the CCE, intended the predicate narcotics offenses to be considered mere means of commission of the continuing criminal offense, this Court must determine that such a construction is constitutional in light of the Due Process Clause.

The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning, carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity

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[35] *Schad v. Arizona*, 501 U.S. 624, 632 (1990).

the legal basis of the charge against him.[36] As this Court stated in *Schad v. Arizona*:

> [N]o person may be punished criminally save upon proof of some specific illegal conduct. Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses, [citation omitted], nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction. [footnote omitted].

Schad v. Arizona, 501 U.S. at 633.

The issue of verdict specificity had not been treated by the Supreme Court prior to *Schad, supra*, although it had arisen in the lower courts in the context of the Sixth Amendment guarantee of a unanimous verdict.[37] In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the defendant was charged in a single count with violating 18 U.S.C. § 2313, which prohibited knowingly receiving, concealing, storing, bartering, selling or disposing of any stolen vehicle. The defendant was convicted after the trial court charged the jury that it need not agree on which of the enumerated acts the defendant had committed. The Fifth Circuit reversed finding a violation of the defendant's right to "jury concensus as to [his] course of

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[36] *Id.*

[37] This Court has recognized that the issue is more accurately characterized as a Due Process concern. *Schad v. Arizona*, 501 U.S. at 634, note 5.

action." *United States v. Gipson*, 553 F.2d at 456. The court found that the statutory prohibitions could be grouped conceptually, so that receiving, concealing and storing could be grouped as "housing," and bartering, selling and disposing could be grouped as "marketing." The Fifth Circuit held that the jury must decide separately as to each grouping. *United States v. Gipson*, 553 F.2d at 456-459. This Court in *Schad, supra*, refused to adopt the conceptual groupings test, however, because ultimately "the notion is too indeterminate to provide concrete guidance to courts faced with verdict specificity questions." *Schad v. Arizona*, 501 U. S. at 635.

In both *United States v. Gipson, supra*, and *Schad v. Arizona, supra*, the verdict specificity issue was slightly different from that in this case. In each of those cases, the jury was left with a number of theories of criminal conduct from which to choose, rather than with a number of separate predicate acts from which to choose. This case is more similar to *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987). In *Beros*, the defendant, a union official was charged with violations of 29 U.S.C. § 501(c) and 18 U.S.C. § 664.[38] In several of the counts charging those

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[38] In pertinent part, section 501(c) provides that:

> [a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly [is guilty of an offense].

29 U.S.C. § 501(c) (1982). Similarly, section 664 provides that:

> [a]ny person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use or to the

violations, the government contended that the violations were accomplished by the defendant's engaging in several activities any one of which could have supported a conviction in more than one manner.[39] The trial judge instructed the jury that

> the government contends the defendant violated [the particular statute] in more than one manner . . . Therefore, if you find beyond a reasonable doubt that one method, mode, or manner of violating the law occurred, that is sufficient to find the defendant guilty so long as you agree

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> use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefits plan, or of any fund connected therewith, shall be [guilty of an offense].

18 U.S.C. § 664 (1982).

[39] E.g., in Count 3 of the indictment, it was alleged that:

> the defendant James M. Beros, did willfully and unlawfully embezzle, steal, abstract and convert to his own use the monies, funds, property and other assets of Joint Council 40, to wit, the approximate sum of $1,063,000, expenses incurred by James M. Beros for a plane ticket in the name of Mrs. C. Beros, for a flight to Ft. Lauderdale, Florida, and lodging in Hollywood, Florida.

The government presented evidence as proof of that charge that in connection with the trip to Florida, ostensibly to attend a union conference, Beros (1) used a Joint Council credit card to pay airfare for himself and his wife; (2) occupied a hotel suite that cost $160 per day, rather than a room which would have cost $60 per day; and (3) remained in Florida for personal reasons after the conference but continued to expend union funds. *United States v. Beros*, 833 F.2d at 458.

> unanimously upon the particular method, mode or manner that occurred.

United States v. Beros, 833 F.2d at 459.

The Third Circuit reversed the conviction because of the inherent potential for juror confusion where the jury was not instructed that it must find unanimously that the defendant committed a particular *predicate act* which violated the law. The court, citing the possibility of a patchwork verdict as to such a predicate act, condemned the possibility of conviction by a jury that was not unanimous as to the defendant's specific illegal action.

> In this case, the permutations that can support a valid conviction are varied and several. What may not vary, however, ~~is~~ the required unanimity of each aspect of the jury's finding. We are convinced that the Sixth Amendment requires such unanimity, and we must be certain that the jury was properly instructed to achieve it. [citation omitted].

United States v. Beros, supra, at 462.

When the Third Circuit later decided *United States v. Echeverri*, 854 F.2d 638 (1988), where the defendant was charged with a CCE violation, it found that case to be indistinguishable from *United States v. Beros*. The trial court refused to instruct the jurors that they must reach unanimous agreement concerning which three predicate narcotics violations had occurred. The Third Circuit found, as in *Beros*, that "the district court failed to ensure that the 'jurors [would] be in substantial agreement as to just what [happened] as a step preliminary to determining whether the defendant is guilty of the crime charged.'

[citing *United States v. Gipson, supra*]." *United States v. Echeverri*, 854 F.2d at 643.

The Third Circuit, *en banc*, later elaborated on this view in *United States v. Edmonds*, 80 F.3d 810 (3d Cir. 1996). The defendant was convicted of violating the CCE statute after the court refused to instruct the jury that they must unanimously agree on which three related violations had occurred. The Third Circuit examined the issue in light of *Schad v. Arizona*, 501 U.S. 624 (1991), turning first to the legislative history and then to "tradition in criminal jurisprudence."[40]

> Criminal trials have long ensured substantial jury agreement as to the facts establishing the offense. This is because criminal statutes and common law have generally defined crimes in terms of conduct (and accompanying mental state) that takes place in a single place at some specific time. For example, murder statutes require that the defendant killed some other person, an act occurring in some specified time and place. . . . When there is a real risk that a jury will convict without agreement on a discrete set of actions, courts have required specific unanimity instructions. [citation omitted]. In our view, substantial agreement on a discrete set of actions is essential to ensure that the defendant

[40] *United States v. Edmonds*, 3 F.3d 810 at 818. The Third Circuit first examined the tradition in criminal jurisprudence as an aid to interpreting the CCE statute, but also recognized that due process is defined in part by historical practice. *Id.* at 819. This was a factor recognized by this Court in *Schad v. Arizona*, 501 U.S. at 640.

> is guilty beyond a reasonable doubt of some specific illegal conduct.[41]

United States v. Edmonds, 3 F.3d at 817-818.

The court concluded that Congress had not intended that a CCE conviction could rest upon jury agreement merely that the defendant committed some three narcotics violations even where it was alleged the defendant had committed many different acts occurring at different times and places. The court cited Judge Scalia's concurring opinion in *Schad* where he pointed out, in criticizing the plurality's moral equivalence test of constitutionality, "[w]e would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence of those two acts.' " *United States v. Edmonds, supra*, at 819.

The case before this Court is factually indistinguishable from *Edmonds*. Richardson was charged generally with a continuing series of violations of the narcotics laws. No specific incidents of such violations were charged in the indictment. The prosecutor presented evidence at trial of "thousands" of such violations, and invited the jury to find any three of those thousands as predicates for a continuing series. Finally the judge instructed the jury that it need not find unanimously as to which particular violations had been committed. The rationale in *Edmonds* is compelling and should be applied in this case. Richardson's right to Due Process was violated by the trial court's instructions.

[41] The court cites to a discussion of this issue in Scott W. Howe, *Jury Fact-Finding in Criminal Cases*, 58 Mo.L.Rev. 1 (1993) for additional support.

4. The Trial Court's Failure to Properly Instruct the Jury was not Harmless Error.

The trial court's error in improperly instructing the jury in this case allowed the jury to return a non-unanimous verdict as to an element of the CCE offense. Because of this, the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967), does not apply.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court unanimously held that a constitutionally deficient reasonable doubt instruction is not subject to harmless error analysis. The Court reasoned that a verdict of guilty beyond a reasonable doubt is a necessary predicate of the harmless error inquiry. The failure of the trial court to give a proper instruction thus rendered the jury verdict meaningless, providing no object on which the harmless error analysis could be applied. *Sullivan v. Louisiana*, 508 U.S. at 279-80.

In this case the jury was erroneously instructed that it need not find unanimously as to which three predicate narcotics offenses had been committed. Therefore there is no actual verdict of guilty upon which the harmless error analysis can operate. Furthermore, since there were no predicate acts charged substantively, there were no facts necessarily found by the jury so closely related to the fact tainted by the erroneous instruction as to result in a functionally equivalent finding.[42] Accordingly the error in this case cannot be said to be harmless beyond a reasonable doubt and the judgment should be reversed.

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[42] *See Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in judgment).

CONCLUSION

For all of the foregoing reasons, Petitioner Eddie Richardson respectfully requests this Court for an order reversing and remanding for a new trial his conviction on Count Two of the Indictment.

Respectfully submitted,

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No. 97-8629

In the Supreme Court of the United States

OCTOBER TERM, 1998

EDDIE RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "continuing series of violations" required for conviction for conducting a continuing criminal enterprise in violation of 21 U.S.C. 848.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 48-77) is reported at 130 F.3d 765.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1997. The petition for rehearing was denied on January 7, 1998. The petition for a writ of certiorari was filed on April 7, 1998, and was granted on October 5, 1998. J.A. 78. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was

convicted of conspiring to possess with intent to distribute and conspiring to distribute crack cocaine, powder cocaine, and heroin, in violation of 21 U.S.C. 846. Petitioner was also convicted of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. He was sentenced to life imprisonment. The court of appeals affirmed. J.A. 48-77.

1. In 1970, petitioner formed a street gang in Chicago, Illinois, known as the Undertaker Vice Lords. The gang was organized hierarchically, with five groups of members called "generations." Each generation had members of approximately the same age who joined the gang at approximately the same time. Each generation also had its own "King" and "Prince." Petitioner was the "King of all the Undertakers" and a "Universal Elite" within the "Vice Lord Nation." Petitioner not only controlled the gang, but also oversaw the distribution of heroin, crack cocaine, and powder cocaine. Petitioner and co-defendant Carmen Tate permitted only members of the Undertakers and others granted permission by them to sell drugs in the Undertakers' territory. J.A. 50.

Petitioner's gang prepared and packaged the drugs in established locations. From there, runners delivered the drugs to particular drug "spots," and the workers then sold the drugs. Petitioner and Tate established a system of gang rules and enforced them through punishments called "violations." The violations ranged from being barred from selling, to being beaten with bricks, bottles or ax handles, to being stabbed or shot, to being killed. J.A. 50-51.

Between 1984 and 1990, petitioner and the Undertakers were primarily engaged in the sale of brown heroin. Johnnie Chew, who ran one of petitioner's heroin "spots," testified that, from the winter of 1987 to

the end of 1988, the Undertakers sold approximately 25 kilograms of brown heroin. Co-defendant Lennel Smith stated that, between 1985 and 1988, he made approximately $50,000 selling brown heroin for petitioner. J.A. 51.

In the fall of 1988, petitioner and the Undertakers began to distribute white heroin. Petitioner provided to one of his sellers, Michael Sargent, $40,000 to $60,000 worth of white heroin three times a week. Another seller, Sectric Curry, told a government agent that he made more than $50,000 selling drugs for petitioner and Tate. A third seller, Nate Hall, told a government agent that he made approximately $60,000 selling drugs for petitioner and Tate. Between 1998 and 1990, the Undertakers sold more than 100 kilograms of white heroin. J.A. 51-52.

In November 1990, the Undertakers branched into the distribution of crack cocaine. Tate and Andre Cal "cooked" a quarter kilogram of cocaine into crack two to three times per week during a ten month period. During that period, the Undertakers sold more than 25 kilograms of crack. Petitioner and Tate also oversaw the distribution of powder cocaine. The conspiracy was uncovered when an agent of the Bureau of Alcohol, Tobacco, and Firearms began making small drug purchases from low-level members of the gang, who then cooperated with the government. J.A. 52-53.

2. In March 1994, petitioner and others were charged with conspiring to distribute controlled substances, in violation of 21 U.S.C. 846. J.A. 49. Petitioner and Tate were also charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. J.A. 49. The latter charge is at issue here.

A person engages in a continuing criminal enterprise if:

> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —
>
> > (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> >
> > (B) from which such person obtains substantial income or resources.

21 U.S.C. 848(c). The indictment charged that petitioner's "continuing series of violations" included repeated instances in which petitioner distributed and possessed with the intent to distribute cocaine, cocaine base, and heroin. J.A. 11-12.

After a trial, the district court instructed the jury that, in order to find petitioner guilty of engaging in a continuing criminal enterprise, the government was required to prove:

> First, that the defendant committed a continuing series of at least three or more of the federal narcotics offenses alleged in Count 2 and at least one of the federal narcotics offenses occurred after the date of March 24, 1989;
>
> Second, that the defendant committed the offense acting in concert with five or more other persons;

> Third, that the defendant acted as an organizer, supervisor, or manager of five or more other persons; and
>
> Fourth, that the defendant obtained substantial income or resources from the offenses.

J.A. 34. The district court further instructed the jury that the the federal narcotics offenses that it could consider in determining whether petitioner engaged in a continuing criminal enterprise include "one, possession of a controlled substance with intent to distribute it, or, two, distributing or causing to be distributed, or aiding and abetting the distribution of, a controlled substance." J.A. 35.

With respect to the "continuing series" element, the court instructed the jury that "[y]ou must unanimously agree that the defendant committed at least three federal narcotics offenses. You do not, however, have to agree as to the particular three or more federal narcotics offenses committed by the defendant." J.A. 37. The court rejected an instruction proposed by Tate that would have required the jury to "unanimously agree on which three acts constituted [the] series of violations." J.A. 21. Petitioner objected to the district court's failure to give that instruction. J.A. 25.

In closing argument, government counsel explained how the government had proven that petitioner had engaged in a series of violations as follows:

> What we are talking about in this case is literally thousands of independent drug transactions. Every time an individual $20 bag of heroin was sold, every time an individual $10 bag of rock cocaine was sold, that is a separate drug crime. And you literally had

a series of thousands, and you can rely upon any of those three in reaching your verdict.

J.A. 31. Petitioner was subsequently convicted of engaging in a CCE violation.

3. The court of appeals affirmed. J.A. 48-77. Relying on its decision in *United States* v. *Kramer*, 955 F.2d 479 (7th Cir.), cert. denied, 506 U.S. 998 (1992), the court of appeals held that the jury was not required to agree unanimously on the identity of the predicate drug offenses that constitute the "series." J.A. 71-72.

SUMMARY OF ARGUMENT

The CCE statute requires proof that the defendant committed a federal felony drug violation that was a part of a "continuing series" of federal drug violations, undertaken with five or more persons supervised by the defendant and from which the defendant obtained substantial revenue. The "continuing series" element requires that the jury unanimously agree that a "continuing series" was proved, but it does not require unanimous jury agreement on the identity of the drug violations that make up the series.

In *Schad* v. *Arizona*, 501 U.S. 624 (1991), this Court made clear that, under the Constitution, a valid conviction does not require that jurors agree on the probative force of particular items of evidence or on the particular means a defendant used to commit an element of a crime. Rather, unanimous jury agreement that the essential elements were established is sufficient to satisfy the Constitution. The inquiry under *Schad* thus requires a court to ask, first, whether the legislature intended proof of a particular fact to be an element of a crime, or, alternatively, merely a means for proving an element. Second, a court must ask whether the legislature's designation of a fact as a "means"

transgresses constitutional norms of rationality and fairness.

Here, all relevant factors indicate that Congress intended the "continuing series" to be an element of a CCE violation, but did not intend to require unanimous juror agreement on which violations formed the series; those violations are merely a means of proving the "continuing series" element. The statutory text focuses on the defendant's leadership of, and extraction of revenues from, a continuing course of illegal drug activity in concert with a group of five or more persons. It uses the term "continuing series," but does not require identification of particular violations, thus indicating that juror agreement on the ultimate issue of a "continuing series" is sufficient to satisfy the statute.

The background, purposes, and structure of the CCE statute reinforce that conclusion. The CCE statute was designed to combat major drug activity by organized enterprises. It therefore targets the leaders of drug enterprises, rather than particular drug violations. When ongoing drug activity is proved, the "continuous series" element is thus met. The same approach applies to each of the "enterprise" elements–that the defendant act in concert with five or more persons; that he be an organizer, supervisor, or manager; and that he acquire "substantial income or resources." Each enterprise element can be satisfied in a variety of ways and with a variety of factual predicates, but jurors need only agree on the ultimate conclusion that the element was proved, rather than the particular means by which it was proved.

The Constitution permits Congress to construct the CCE statute in that manner. There is nothing irrational in Congress's decision to make the commission of any of a number of federal drug violations, related to

one another and undertaken by a group acting under the defendant's supervision, sufficient to constitute a "continuing series." This is not a case in which Congress has lumped together disparate crimes, with no ostensible function (except to evade unanimity requirements). Rather, the CCE statute's elements make clear its focus on the overall drug enterprise.

In *Schad*, the plurality found it particularly relevant to ask whether the treatment of a particular fact as a means (rather than an element) accorded with historical and present practice. But the plurality also recognized that history would afford less guidance in cases of modern statutes lacking common-law roots. The CCE statute is a response to a modern problem, and its constitutionality is not called into question by its novelty. It is notable, moreover, that to the extent that the "continuing series" element resembles state-law "course of conduct" offenses, the States have not required unanimity as to the acts composing the course of conduct. *Schad* also found it relevant to ask whether the specified alternative means showed "moral equivalence." In this case, all of the means to show the series were felony distribution and possession-with-intent-to-distribute offenses, which readily satisfy a moral equivalence test. Even in cases involving more disparate drug offenses, the CCE statute's focus is on the series of violations by a drug trafficking organization, rather than the individual predicate acts. Given that focus, the Constitution does not require unanimous juror agreement on each predicate drug violation.

ARGUMENT

THE JURY NEED NOT REACH UNANIMOUS AGREEMENT ON WHICH PREDICATE DRUG OFFENSES CONSTITUTE THE "CONTINUING SERIES OF VIOLATIONS" REQUIRED UNDER THE CCE STATUTE

The CCE statute makes it a crime to engage in a "continuing criminal enterprise." 21 U.S.C. 848(a). A defendant engages in a continuing criminal enterprise when (1) the defendant violates any provision of subchapters I or II of Title 21, which define narcotics offenses, that is punished as a felony; (2) "such violation is a part of a continuing series of violations" of those subchapters; (3) the defendant commits the series of violations in concert with five or more other persons; (4) the defendant acts as an organizer, supervisor, or manager of those five or more persons; and (5) the defendant obtains substantial income or resources from the series of violations. 21 U.S.C. 848(c).

This case concerns the second element—the requirement that the government establish a "continuing series of violations." With respect to that element, the district court instructed the jury that it "must unanimously agree that the defendant committed at least three federal narcotics offenses," but that it need not agree "as to the particular three or more federal narcotics offenses committed by the defendant." J.A. 37. Petitioner contends that the district court erred in giving that instruction. Specifically, he argues that the district court was required by the Sixth Amendment and the Due Process Clause to instruct the jury that it must unanimously agree on the particular narcotics offenses that make up the series. As we demonstrate below, the district court did not err in refusing to give that instruction.

A. *SCHAD* V. *ARIZONA*, 501 U.S. 624 (1991), SUPPLIES THE FRAMEWORK FOR ANALYZING PETITIONER'S UNANIMITY CLAIM

1. "In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of *federal* jury trial." *Johnson* v. *Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring); *United States* v. *Gaudin*, 515 U.S. 506, 509-510 (1995); see Fed. R. Crim. P. 31(a).[1] There is no requirement, however, that jurors reach agreement on the underlying facts that support each element of an offense. Different jurors may rely on different pieces of evidence and may reach different conclusions concerning the manner in which a defendant committed an offense, as long as the jurors unanimously arrive at the same ultimate conclusion that the government has proven each of the element of the offense.

---

[1] In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), the Court held that the Constitution does not require jury unanimity in a state trial. Five Justices in that case, and in its companion case, *Johnson*, *supra*, however, concluded that the Constitution requires jury unanimity in a federal trial. *Johnson*, 406 U.S. at 369-371; (Powell, J., concurring in the judgment); *id.* at 382-383 (Douglas, J., dissenting); *id.* at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting); *id.* at 414 (Stewart, J., dissenting); see also *Andres* v. *United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."); 2 J. Story, *Commentaries on the Constitution of the United States*, 541 n.2 (4th ed. 1873) (Sixth Amendment right to trial by jury includes a unanimity requirement); 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769); (describing trial by jury as including a unanimity requirement), cf. *United States* v. *Lopez*, 581 F.2d 1338 (9th Cir. 1978) (Kennedy, J.) (holding that the "jury unanimity required by Federal Rule of Criminal Procedure 31 cannot be waived by the defendant").

Schad v. *Arizona*, 501 U.S. 624 (1991), explicates those basic principles. Before *Schad*, it was well established that an indictment did not need to specify which overt act was the means by which an offense was committed. For example, in *Andersen* v. *United States*, 170 U.S. 481 (1898), the Court sustained a capital conviction of murder against challenges based on a claim that the indictment was duplicitous because it charged that death occurred through both shooting and drowning. The Court explained that it was immaterial to the validity of the conviction whether death was caused by one means or the other. *Id.* at 500. Similarly, in *Borum* v. *United States*, 284 U.S. 596 (1932), the Court sustained the capital conviction of three co-defendants for first-degree murder under a count that failed to specify which of the three did the actual killing.

In *Schad*, the Court derived from the cases holding that the government was not required to specify in the indictment the means by which an offense is committed the additional principle that the jury need not agree on those means. The four-Justice plurality stated that "[w]e have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." 501 U.S. at 631 (plurality opinion). Instead, the plurality explained, "[i]n these cases, as in litigation generally, 'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" *Id.* at 631-632 (citation omitted).

In his concurring opinion, Justice Scalia agreed with that aspect of the plurality's decision. He stated that

"it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." 501 U.S. at 649 (Scalia, J., concurring in part and concurring in the judgment). That rule, Justice Scalia concluded, "is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict." *Id.* at 650. Justice Scalia explained that "[w]hen a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her." *Ibid.* Thus, a majority of the Court in *Schad* concluded that jurors need not agree on which of various alternative means the defendant used to commit an offense.

2. As the plurality in *Schad* explained, the question whether a particular fact is a necessary element of an offense, or merely one means for proving an element, is primarily a question of statutory interpretation. 501 U.S. at 635-636 (plurality opinion). The plurality expressly rejected the view of the dissent in that case that "whenever a statute lists alternative means of committing a crime, the jury must indicate on which of the alternatives it has based the defendant's guilt," on the ground that it "rests on the erroneous assumption that any statutory alternatives are ipso facto independent elements defining independent crimes * * * and therefore subject to the axiomatic principle that the prosecution must prove independently every element of the crime." *Ibid.* Because "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes," the plurality explained, "[t]he question whether statutory alternatives constitute independent elements of the offense * * * is a substantial question of statutory construction." *Ibid.*

3. While legislative intent is the principal consideration in deciding the facts about which a jury must be unanimous, *Schad* also establishes that there are limits to that power. The plurality stated that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." 501 U.S. at 633. Justice Scalia agreed that "one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process." *Id.* at 650. Similarly, Justice Scalia observed that the Court "would not permit * * * an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." *Id.* at 651. The problem with such statutes is that they violate the due process norms of "fundamental fairness" and "rationality," *Schad*, 501 U.S. at 637 (plurality opinion).

The plurality in *Schad* concluded that it was impossible to establish a single test for determining the limits of a legislature's power to define the elements of an offense. 501 U.S. at 637. It did, however, offer three general considerations. First, because decisions about what facts are necessary to constitute the crime, and what facts are mere means "represent value choices more appropriately made in the first instance by a legislature," a court must give the legislature's choice great deference. *Id.* at 638. Second, when the legis-

lature's way of defining a crime has a long history or is in widespread use, it would be difficult to challenge, while a "freakish" definition without an analogue in history would be subject to greater scrutiny. *Id.* at 640. Third, if two means could rationally be perceived as reflecting equal degrees of blameworthiness, it would support the legislature's judgment to treat them as means rather than elements, but if the two means could not be reasonably viewed as morally equivalent, the legislature's choice would be more suspect. *Id.* at 643. Ultimately, a legislature's definition of the elements of the offense "is usually dispositive." *Id.* at 639 (internal quotation marks omitted).

4. Applying its analysis, the plurality in *Schad* upheld the constitutionality of an Arizona statute that permitted a jury to convict a defendant of first-degree murder without requiring unanimity on whether the defendant engaged in premeditated murder or felony-murder. The first inquiry—whether the legislature intended for the two forms of murder to be independent crimes or alternatives means for proving the same crime—had been authoritatively resolved by the Arizona Supreme Court. That court had held that, under Arizona law, premeditated murder and felony murder were merely different "means" of committing a single offense, and that state-law determination was binding on the Court. 501 U.S. at 637. In resolving the second inquiry—whether the legislature's choice was consistent with due process—the plurality deemed it significant that Arizona's definition of premeditated murder and felony murder as alternative means was supported by both history and contemporary practice. *Id.* at 640-643. The plurality also found it important that the two means could reasonably be viewed as moral equivalents when, as was true in that case, the

felony is a robbery. *Id.* at 643-644. Justice Scalia concurred in the judgment on the ground that history alone was sufficient to uphold the constitutionality of Arizona's choice. *Id.* at 651-652.

B. THE CCE STATUTE MAKES THE PREDICATE DRUG OFFENSES ALTERNATIVE MEANS BY WHICH THE "CONTINUING-SERIES" ELEMENT MAY BE SATISFIED, NOT INDEPENDENT ELEMENTS OF THE OFFENSE

Under the analysis in *Schad*, the first question in resolving petitioner's unanimity claim is one of statutory construction. If Congress viewed the predicate drug offenses as mere alternative means of engaging in a "continuing series of violations," jurors need only agree that the defendant committed the requisite series, without having to agree on which predicate offenses it comprised. If Congress viewed each of the requisite number of predicate offenses as a separate element of a CCE offense, however, jurors must agree on which particular predicate offenses the defendant committed. Ordinary principles of statutory construction lead to the conclusion that Congress intended for the predicate drug offenses to be alternative means for satisfying the continuing series element.

1. The CCE statute provides that the government must prove that a CCE defendant engaged in a "continuing series" of drug offenses. That statutory text focuses on whether a defendant has engaged in a continuing course of illegal conduct, not on the identity of any particular predicate offense. Accordingly, the text of the Act imposes a requirement of jury agreement only on the question whether defendant has engaged in a continuing series, leaving individual jurors free to find a continuing series based on the same,

overlapping, or entirely different predicate offenses. As Judge Garth has stated, "[t]he plain reading and meaning of the CCE statute does not require the identification of the particular predicate acts as an element of the CCE offense. Therefore, the jury need not have unanimously agreed on the same three predicate acts constituting the 'continuing series.'" *United States* v. *Edmonds*, 80 F.3d 810, 837 (3d Cir.) (Garth, J., concurring in part and dissenting in part), cert. denied, 516 U.S. 999 (1996); accord, *United States* v. *Hall*, 93 F.3d 126, 129 (4th Cir. 1996) ("Under the plain meaning of this section, as long as each juror is satisfied in his or her own mind that the defendant committed acts constituting the series, the requisite jury unanimity exists"), cert. denied, 117 S. Ct. 1087 (1997).

The statute's coverage of a broad array of drug offenses underscores that conclusion. Congress did not confine the list of eligible predicate offenses to a narrow subset of drug offenses. The government may rely on proof of any drug offense. 21 U.S.C. 848(c)(2) ("such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter"). Nor has Congress limited the acts that may constitute proof of the series to offenses for which a defendant has been convicted. A series may consist of drug offenses for which the defendant has never been separately charged. See, *e.g.*, *United States* v. *Rosenthal*, 793 F.2d 1214, 1226-1227 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Markowski*, 772 F.2d 358, 361-362 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986). Congress did not even define the number of predicate acts required to constitute a "series." Some circuits require proof of at least three predicate acts (*United States* v. *Fernandez*, 822 F.2d 382, 384-385 (3d Cir.), cert. denied, 484 U.S. 963 (1987); *United States* v. *Ricks*, 802 F.2d 731, 737 (4th Cir.) (en banc), cert. denied, 479 U.S. 1009 (1986); *United States* v. *Young*, 745 F.2d 733, 750-752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985)), while one circuit requires proof of only two. *United States* v. *Baker*, 905 F.2d 1100, 1104 (7th Cir.), cert. denied, 498 U.S. 876 (1990). "The broadness with which Congress defined a 'continuing series of violations' indicates that the exact identities of the predicate offenses necessary for a jury to find a 'continuing series' * * * are not essential facts constituting an element of the offense." *Edmonds*, 80 F.3d at 837 (Garth, J., concurring in part and dissenting in part); see also *United States* v. *Canino*, 949 F.2d 928, 946 n.6 (7th Cir. 1991), cert. denied, 504 U.S. 910 (1992) ("The expansive breadth of culpable offenses suitable for CCE treatment diminishes our need to ascertain precisely what acts each juror finds attributable to the defendant, and instead permits us to focus on whether the jury is convinced that the defendant performed these conspiratorial acts with the required frequency.").

2. The background to the CCE statute further supports the conclusion that the predicate offenses are means of satisfying the continuing-series element rather than distinct elements themselves. Congress enacted the CCE statute as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. After considerable study, Congress found that "[d]rug abuse in the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions." H.R. Rep. No. 1444, 91st Cong., 2d Sess., pt. 1, at 6 (1970). Congress concluded that drug enforcement laws of the past had been "for the most part, ineffective in halting the increased upsurge of drug abuse throughout our United States," and that new approaches were therefore

needed. 116 Cong. Rec. 33,630 (1970). The CCE statute represented one such innovative approach, designed to "add a new enforcement tool to the substantive drug offenses already available to prosecutors." *Garrett* v. *United States*, 471 U.S. 773, 784 (1985). The statute sought to reach "not the lieutenants and foot soldiers" in a drug ring, but the "top brass," *id.* at 781. To accomplish that end, the statute departed significantly from common-law models and prior drug laws, creating a new crime keyed to the concept of a "continuing criminal enterprise."

In defining a "continuing criminal enterprise" by reference to a "series of violations" of the drug laws, Congress was not interested in punishing drug kingpins for individual drug offenses. As this Court has observed, "Congress [did not] intend[ ] to substitute the CCE offense for the underlying predicate offenses in the case of a big-time drug dealer," but rather "to permit prosecution for CCE in addition to prosecution for the predicate offenses." *Garrett*, 471 U.S. at 785. The function of the "series" element is to effectuate Congress's intent to impose enhanced punishment on those who direct *ongoing* criminal activity. The "continuing series" element "identifies a drug enterprise which is effective and persistent—qualities which, according to Congress, warrant the enhanced punishment provided by the CCE statute." *United States* v. *Canino*, 949 F.2d at 947.

Because the "series" element is directed at identifying drug enterprises with the requisite continuity and not at punishing drug offenders for discrete drug violations, the identity of the particular violations comprising the "series" is irrelevant. Once each juror finds beyond a reasonable doubt that the CCE defendant committed the requisite number of predicate offenses,

establishing that he participated in a connected series of narcotics activities with sufficient frequency, the purpose of the "series" element is vindicated; there is no need for the jurors to agree on which predicate acts constitute the "series." As the Seventh Circuit explained in *Canino*, "[t]he point of the CCE statute is to impose special punishment on those who organize and direct a significant number of larger-scale drug transactions; the exact specification by unanimous jury consent of any particular three of a greater number of offenses is irrelevant to any theory about why punishment should be enhanced for such uniquely antisocial activity." 949 F.2d at 948.

3. Our interpretation of the series element is consistent with the structure of the Act as a whole. In particular, other elements of the offense do not require jury unanimity at the level sought by petitioner, and it would be unusual for the series element alone to require such unanimity.

With respect to the "five or more persons" element, the courts of appeals have uniformly held that, while the jury must unanimously agree that the defendant acted in concert with five or more persons, they need not agree on the identity of those persons. See *United States* v. *Tipton*, 90 F.3d 861, 885-886 (4th Cir. 1996), cert. denied, 117 S. Ct. 2414 (1997); *United States* v. *Rockelman*, 49 F.3d 418, 421 (8th Cir. 1995); *United States* v. *Harris*, 959 F.2d 246, 254-257 (D.C. Cir.), cert. denied, 506 U.S. 932 (1992); *United States* v. *Moorman*, 944 F.2d 801 (11th Cir. 1991) (per curiam), cert. denied, 503 U.S. 1007 (1992); *United States* v. *English*, 925 F.2d 154, 159 (6th Cir.), cert. denied, 501 U.S. 1210 (1991); *United States* v. *Linn*, 889 F.2d 1369, 1374 (5th Cir. 1989), cert. denied, 498 U.S. 809 (1990); *United States* v. *Jackson*, 879 F.2d 85, 88 (3d Cir. 1989); *United States* v.

Tarvers, 833 F.2d 1068, 1074 (1st Cir. 1987); *United States* v. *Markowski*, 772 F.2d at 364. But *cf. United States* v. *Jerome*, 942 F.2d 1328, 1331 (9th Cir. 1991) (holding that unanimity instruction required where some individuals named by the prosecution as among those whom the defendant supervised could not legally qualify as such).

In reaching that conclusion, those courts have sought to implement Congress's purpose of targeting large-scale drug trafficking enterprises. Given that overriding purpose, those courts have concluded that the five-or-more-persons requirement focuses "upon the size of the enterprise—set at a floor of five—rather than upon the particular identities of those who make up the requisite number." *Tipton*, 90 F.3d at 885. See also, *e.g.*, *Harris*, 959 F.2d at 254; *Markowski*, 772 F.2d at 364. Proof that the defendant acted in concert with five or more persons "establishes that the organization in which the defendant played a leadership role was sufficiently large to warrant the enhanced punishment provided by the CCE statute." *Jackson*, 879 F.2d at 88. Accordingly, "[s]o long as each juror believe[s] that [the defendant] supervised enough people, the jury [is] entitled to convict." *Markowski*, 772 F.2d at 364.

Just as the five-or-more-persons requirement focuses on the size of the enterprise rather than on the identity of the particular persons managed by the CCE defendant, so too does the "series" requirement focus on the continuity of the enterprise rather than on the identity of the predicate drug offenses. There is no more need for juror unanimity as to the underlying facts in the latter context than in the former.

Petitioner's general approach would not only require agreement on the identity of the persons with whom a person acts in concert, it would also lead to unwarranted unanimity requirements with respect to other elements of the CCE offense. For example, the CCE statute requires that the defendant "occup[y] a position of organizer, a supervisory position, or any other position of management" in the enterprise. 21 U.S.C. 848(c)(2)(A). The terms "organizer," "supervisory position," and "other position of management" are used disjunctively, so that it is only necessary that the government establish one of those relationships between the defendant and the persons with whom he acts in concert. *United States* v. *Butler*, 885 F.2d 195, 200 (4th Cir. 1989). The relationships are not coextensive. A supervisor exercises "some degree of control" (*id.* at 201) or "some type of influence" (*United States* v. *Possick*, 849 F.2d 332, 336 (8th Cir. 1988)) over those he supervises. By contrast, an "organizer" does not necessarily exercise such control. Rather, an "organizer" "can be defined as a person who puts together a number of people engaged in separate activities and arranges them . . . in one essentially orderly operation or enterprise." *Butler*, 885 F.2d at 201 (quoting 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 58.21 (1977)). A person can therefore be a supervisor without being an organizer and *vice versa*.

Under petitioner's general approach, when the government introduces evidence that the defendant played both an organizational and supervisory role in the enterprise, the jury would be required to agree unanimously on which of those roles he played. If some jurors believed that the defendant occupied only the position of organizer and others believed he occupied only the position of supervisor, the jury would not be entitled to return a guilty verdict even though all jurors agreed that he occupied a management position. There is no basis in the text or history of the statute, however,

for concluding that Congress intended such an incongruous result.

Another element of the offense is that the defendant must have derived "substantial income or resources" from his drug violations. 21 U.S.C. 848(c)(2)(B). Under petitioner's approach, the jury would be required to agree on the identity of the property that the defendant received before it could convict. For example, if some jurors believed the defendant obtained cash, and others believed he obtained automobiles, the jury would have to acquit. Again, there is no basis for concluding that Congress would have intended such an unusual result.

Petitioner's general approach is misguided. Under the CCE statute, the jury need only agree that the defendant acted in concert with five or more persons; it need not agree on the identity of those persons. The jury need only agree that the defendant was a supervisor, organizer, or other manager; it need not agree on which one. The jury need only agree that the defendant obtained substantial resources; it need not agree on the identity of those resources. And finally, the jury need only agree that the defendant engaged in a series of violations; it need not agree on the identity of particular ones.

When construed in that way, the continuing-series element operates in the same way as other federal offenses that involve a continuous course of criminal conduct. For example, the offense of possession with the intent to distribute a controlled substance is an offense that involves ongoing criminal conduct. The government's evidence in such a case may show that a defendant possessed the controlled substance he received at different places and at different times. To convict such a defendant, the jurors need only agree that the defendant possessed the illegal substance with

the intent to distribute it. They need not reach agreement on when and where the defendant possessed the illegal substance. *United States* v. *Ferris*, 719 F.2d 1405, 1406-1407 (9th Cir. 1983) (in case in which evidence showed various acts of possession in different places over a two-month period, jury was not required to be unanimous on the particular time and place of possession).

4. Petitioner's contrary rule could lead to results that are demonstrably at odds with Congress's purpose of "punishing a defendant whom the jury is convinced was involved in a related series of drug activity with relevant frequency." *Canino*, 949 F.2d at 948 n.7. For example, suppose the government introduced evidence that a CCE defendant engaged in four predicate drug offenses, and six jurors believed beyond a reasonable doubt that the defendant participated in offenses one through three and that he probably participated in offense four, and six jurors believed beyond a reasonable doubt that he participated in offenses two through four and that he probably participated in offense one. If the jurors were required to agree on which three predicate offenses composed the "series," then they would have to acquit the defendant, even though they agreed beyond a reasonable doubt that the defendant engaged in a continuing series of drug offenses. *Ibid.*

To take another example closer to this case, suppose the evidence showed that the CCE defendant headed a drug organization that engaged in numerous street-corner drug transactions daily over an extended period of time, but in which there was no evidence of the facts pertaining to any particular drug transaction. On such evidence, each juror could readily conclude that the defendant participated in a "series of violations," but might not be willing to conclude that any particular,

identifiable transaction took place. Under petitioner's approach, the defendant might well escape conviction. Congress could not have intended for drug kingpins to be able to avoid CCE liability in such circumstances.

5. Petitioner's arguments for requiring jury unanimity on the particular predicate offenses that constitute a continuing series are unsound.

a. Petitioner argues (Br. 16) that the first element of the offense—that the defendant "violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony" (21 U.S.C. 848(c)(1)) necessarily requires jury unanimity on a particular violation. From that premise, petitioner then argues that the continuing-series element should be interpreted in the same way. Petitioner's initial premise is incorrect. The first element is satisfied by proof of a violation of "any provision" of the relevant portions of Title 21. Because of the breadth of that requirement, and its failure to focus on any particular violation of law, jurors may base their conclusions on different predicate acts, as long as they all agree that the defendant committed a violation of one of the drug laws. That interpretation is also consistent with the general purpose of the CCE provision—which is not to punish particular violations, but to provide a unique remedy against those who operate continuing drug businesses and substantially profit from them.

Even if petitioner's premise is correct and the jury must agree on a particular violation to satisfy the first element, it would not follow that the jury would have to be unanimous on the other predicates in the series. The argument in favor of concluding that the first element requires agreement on a particular violation is that the first element refers to a "discrete" violation by the defendant, Pet. Br. 16 n. 27. That focus on an individual

crime committed by the defendant might be thought to require unanimous agreement by the jury on a particular violation. But the continuing-series element addresses joint, ongoing, and lucrative conduct consisting of repeated violations "undertaken" by the defendant "in concert with" five or more underlings. 21 U.S.C. 848(c)(2)(A). The focus is therefore not on individual action of the defendant in committing a crime, but in his leadership of a successful criminal enterprise. See *Rutledge* v. *United States*, 517 U.S. 292, 298 & n.7 (1996) ("in concert with" element requires proof of a drug conspirary plus additional elements). Accordingly, the rationale for requiring the jury to agree on the defendant's particular violation in Section 848(c)(1) has no application to the continuing-series element in Section 848(c)(2).[2]

b. Petitioner next argues that, because jury unanimity would be required if the predicate offenses were charged as separate crimes, it would be anomalous not to require such unanimity in a CCE conviction. That argument, however, ignores the specific purpose of the "continuing-series" requirement. As we have explained, the "continuing-series" element is directed at identifying drug enterprises with the requisite continuity. It therefore makes perfect sense to require jury unanimity only on the question whether there is a

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[2] This case does not present the question whether the jury must agree on a particular violation in order to satisfy Section 848(c)(1). Petitioner did not raise any objection directed to that element in the district court; he did not raise any issue on appeal directed to that element; and the question that has divided the circuits and on which this Court granted certiorari concerns whether unanimity on particular offenses is required to satisfy the "continuing-series" element.

continuing series of violations, and not on the particular violations that underlie the series.

c. Finally, petitioner argues that the legislative history shows that jury unanimity is required on the particular predicates underlying a series. In particular, petitioner relies on Representative Eckhardt's statement that he supported the CCE statute rather than an alternative that would have made the provision a sentencing enhancement, because he favored a jury determination on "every element of the continuing criminal offense." 116 Cong. Rec. 33,631 (1970). That comment, however, simply begs the question presented in this case concerning whether the predicates are elements of the offense or simply means of proving the "continuing-series" element. It provides no guidance in resolving that issue.

C. CONGRESS'S DETERMINATION TO MAKE THE PREDICATE DRUG OFFENSES ALTERNATIVE MEANS OF SATISFYING THE "CONTINUING-SERIES" ELEMENT, RATHER THAN SEPARATE ELEMENTS THEMSELVES, IS CONSTITUTIONAL

Because the ordinary sources of statutory construction show that Congress intended the predicate offenses to be means of proving the continuing-series element, and not elements in themselves, the only remaining question is whether Congress's choice is constitutional.

1. The CCE statute readily satisfies constitutional standards. The CCE statute does not remotely resemble a statute that permits any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering to suffice for conviction (*Schad*, 501 U.S. at 633), or a crime consisting of either robbery or failure to file a tax return (*id.* at 650

(Scalia, J., concurring in part and concurring in the judgment)), or a statute that would permit an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday (*id.* at 651). The common element of those hypothetical statutes is that it is difficult to see a rational purpose for them—other than "circumvention of otherwise applicable jury-unanimity requirements." *Edmonds*, 80 F.3d at 835 (Alito, J., concurring in part and dissenting in part).

The CCE statute is fundamentally different. The structure of the statute reveals that difference. Under the Act, the government must do more than show that the defendant has engaged in predicate violations; the government must prove that the defendant acted in concert with five or more persons, that he acted as a supervisor or organizer of such persons, and that he derived substantial revenues from the violations. "The presence of these additional elements supports the view that the CCE statute represents an effort to define a distinct type of criminal activity." *Edmonds*, 80 F.3d at 836 (Alito, J., concurring in part and dissenting in part).

The background of the CCE statute strongly reinforces that conclusion. As previously discussed, that background shows that Congress concluded that "a new type of criminal activity was growing in importance and that a new type of criminal statute, keyed to the organizational scope of that activity, was needed." *Edmonds*, 80 F.3d at 836 (Alito, J., concurring in part and dissenting in part). Congress therefore had "a rational and legitimate basis for crafting the particular combination of elements required under 21 U.S.C. § 848(c)(2)." *Ibid.* That is sufficient to sustain the constitutionality of the statute. See *Schad*, 501 U.S. 637 (plurality opinion) (due process demands "fundamental fairness" and "rationality").

2. Examination of historical and contemporary practice, as well as the moral equivalence of the alternative means, leads to the same conclusion. See *Schad*, 501 U.S. at 637 (plurality opinion). The CCE statute is not based on any longstanding and widely accepted model. But, as the plurality noted in *Schad*, "history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots, than in cases * * * that deal with crimes that existed at common law." *Id.* at 640 n.7. The reason is "obvious." *Ibid.* As law enforcement needs change, "legislative bodies must have the freedom, within constitutional limits, to devise new ways of responding to those changes, including the creation of new crimes that are not closely modelled on any common law antecedents." *Edmonds*, 80 F.3d at 835 (Alito, J., concurring in part and dissenting in part). CCE, like the RICO statute that was enacted at roughly the same time, see 18 U.S.C. 1961 *et seq.*, creates a novel remedy to combat criminal organizations, in large part because of the inadequacies of prior law. See *United States* v. *Turkette*, 452 U.S. 576, 588-590 (1981) (RICO); *Garrett*, 471 U.S. at 782-784 (CCE).

Moreover, there is nothing "freakish" about the "continuing-series" element itself. *Schad*, 501 U.S. at 640 (plurality opinion). Numerous state laws prohibit course-of-conduct offenses, without requiring unanimity on each feature that satisfies that element. For example, California makes it unlawful for a person who resides in the same house as a minor child to engage in three or more acts of sexual abuse of the child over a three-month period. Cal. Penal Code § 288.5(a). In prosecutions for that offense, the jury is not required to reach agreement on the particular underlying acts of sexual abuse. *Id.* § 288.5(b). See *People* v. *Gear*, 23 Cal.

Rptr. 2d 261, 263-266 (Ct. App. 1993) (upholding constitutionality of the California Act, on the ground that, in a course-of-conduct offense, a jury need not reach agreement on the specific underlying acts), cert. denied, 511 U.S. 1088 (1994). Other course-of-conduct offenses similarly do not require jury unanimity on the particular acts underlying the illegal course of conduct. See, *e.g.*, *People* v. *Reynolds*, 689 N.E. 2d 335, 343-344 (Ill. App. Ct. 1997) (in prosecution for sexual assault and aggravated sexual abuse of a minor, jury was not required to agree on the specific incidents of sexual interaction where the prosecution proceeded on the theory that the defendant engaged in a continuous course of conduct); *State* v. *Spigarolo*, 556 A.2d 112, 129 (Conn.) (in prosecution for engaging in acts likely to impair the health or morals of a minor child, the jury was not required to reach unanimous agreement on the specific acts of sexual abuse underlying the offense where the prosecution proceeded on the theory that the defendant's conduct was in the nature of a continuing offense), cert. denied, 493 U.S. 933 (1989).[3] The

[3] See also *People* v. *Gunn*, 242 Cal. Rptr. 834, 838 (Ct. App. 1987) (in prosecution for harboring a known felon, jury was not required to agree on which of three acts constituted harboring when the prosecution charged that all three acts were part of a continuing course of conduct); *People* v. *Ewing*, 140 Cal. Rptr. 299, 300-301 (Ct. App. 1977) (in prosecution which alleged that the defendant engaged in a course of child abuse between two designated dates, the jury was not required to agree on the particular acts of child abuse); *People* v. *White*, 152 Cal. Rptr. 312, 317 (Ct. App. 1979) (in prosecution alleging that defendant procured a place in which a woman engaged in prostitution over a five-month period, the jury was not required to agree on any particular act of prostitution as long as it agreed that at least one such act took place); *People* v. *Lowell*, 175 P.2d 846, 848-849 (Cal. Dist. Ct. App. 1946) (in prosecution alleging that the defendant contributed to the

continuing-series element of a CCE offense has some similarities to course-of-conduct offenses, and those analogues in criminal law support its consistency with constitutional requirements.

The series element also satisfies the moral equivalence test. In analyzing the question of reasonable "moral equivalence," the question is not whether all possible predicate offenses are morally equivalent. Rather, the question is whether the predicate offenses charged in this case may reasonably be viewed as morally equivalent. *Schad*, 501 U.S. at 644 (plurality opinion). Here, the district court instructed the jury that the federal narcotics offenses that it could consider for purposes of determining whether petitioner engaged in a continuing criminal enterprise include "one, possession of a controlled substance with intent to distribute it, or, two, distributing or causing to be distributed, or aiding and abetting the distribution of, a controlled substance." J.A. 35. Those two offenses—possession of a controlled substance with an intent to distribute, and distribution—may reasonably be viewed as moral equivalents. Moreover, those offenses, together with unlawful importation offenses and conspiracy offenses are the offenses most likely to be used to satisfy the series element, and all of those offenses may reasonably be viewed as morally equivalent.

Even in those instances in which individual predicate drug offenses may differ in blameworthiness, as would be the case if a simple possession offense were charged as one of the predicates, it is important to recognize

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delinquency of a minor through various acts, including several acts of sexual abuse, the jury was not required to agree on a particular act that caused delinquency).

that the CCE statute does not target predicate offenses individually. Rather, the function of the "continuing-series" requirement is to establish that the group that defendant headed engaged in drug violations with sufficient frequency to denote the existence of a continuing criminal enterprise. For that purpose, the relative seriousness of the offenses is immaterial; it is the continuity of the criminal enterprise that counts. As Judge Garth explained in his dissenting opinion in *Edmonds*, "Congress has * * * determined that regardless of the exact identity or seriousness of the predicate acts constituting the 'continuing series,' a defendant is equally blameworthy so long as he has engaged in multiple related drug-related offenses" and the other elements of the CCE offense are proven. 80 F.3d at 841. Indeed, "a specific unanimity instruction to the jury would do nothing to change the fact that a defendant could be convicted for CCE regardless of whether the jury found that he engaged in a series of first-time simple possession offenses or whether the jury found that he engaged in a series of more serious crimes such as distributing large quantities of drugs." *Ibid.*

In sum, Congress reasonably decided to make predicate offenses alternative means of satisfying the "continuing-series" element, rather than elements themselves. That choice is fully consistent with the Constitution.[4]

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[4] Petitioner argues (Br. 28) that any error in instructing the jury on the series element was not harmless. The court of appeals did not decide that issue, and this Court may, in any event, clarify the proper form of harmless-error analysis in *Neder* v. *United States*, No. 97-1985 (to be argued Feb. 23, 1999). Accordingly, if this Court resolves the circuit conflict at issue in this case by agreeing with petitioner on the degree of unanimity required to

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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establish the series element, it should remand to the court of appeals to allow that court to evaluate the harmless-error issue in the first instance.

No. 97-8629

In The

Supreme Court of the United States

October Term, 1998

EDDIE RICHARDSON,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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I. Due Process Requires that the CCE Statute be Interpreted to Require Juror Unanimity as to the Predicate Narcotics Violations.

A. Fundamental Principles of Due Process Require Specificity as to an Alleged Offense.

The government's argument that the jury should only be required to find unanimously that a "series" of violations has been committed, and not which violations were committed, essentially would require no unanimity at all on this element of the offense. In order to identify the series, one must identify the offenses which define the series. Otherwise the jury is left only with the task of determining whether the members are unanimous in sharing a "sense that the defendant exhibited such conspiratorial frequency rather than a shared sense of what those acts may have been," as the Seventh Circuit unabashedly suggests is appropriate.[1]

What does the phrase "continuing series of violations" mean? "Series" is defined as "a number of things or events of the same class coming one after another in spatial or temporal succession."[2] A "series" is meaningless without the object of the "series" to define it. This is true even if the "series" is quantified, as in "a series of three or more." This is likewise true even if the "series" is qualified, as in "a continuing series." The elemental meaning of a phrase which includes the word "series" is

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[1] *United States v. Canino*, 949 F.2d 928, 948 n. 7 (7th Cir. 1991).

[2] Merriam-Webster's Collegiate Dictionary, Tenth Edition.

only to be found in the prepositional phrase following the word "series," whether that phrase is expressed or implicit from the context in which the word is used. Thus it is the "violations" which give meaning to the phrase "series of violations."

The Due Process Clause requires more than a jury's unanimous sense of the defendant's commission of a generic "series" of unspecified violations. A defendant charged under a valid statute, or validly interpreted statute, as the case may be, must be in a position to understand with sufficient specificity the nature of the charge against him and to defend against it. The corollary to this principle is that the charge must not be so vague that people of common intelligence, such as the jury evaluating the evidence, would differ in their guesses as to the meaning of the charge. This is true when the statute, in its vagueness or in the breadth of its characterization of the types of forbidden activity, provides the opportunity for differing as to the legal basis of the charge, as this Court suggested in *Schad v. Arizona*, 501 U.S. 624, 632 (1990), and as the Third Circuit held in *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987). But it is also true, and perhaps more significantly true, when the statute allows, or is interpreted to allow, charges too vague to require the jury to agree as to the *actus reus* of the offense. Such is the case suggested by Justice Scalia, where an indictment might charge "that the defendant assaulted either X on Tuesday or Y on Wednesday." *Schad v. Arizona, supra*, at 501 U.S. 651.

That is precisely what the indictment has done, and the lower courts have allowed, in this case. The government produced testimonial evidence from three questionable witnesses as to activities, primarily described in general terms without reference to specific incidents, comprising thousands of transactions occurring over several years. The jury was then invited to decide individually which acts constituted the series of three or more, and each juror having made that decision, to decide as a group that a "series" had been committed. The meaninglessness of finding a "series" without finding the definitional objects thereof is apparent.

The government's position that it should be allowed to charge, and the jury allowed to convict a defendant of a generalized unspecified offense is apparently not limited solely to the "series" element. The government asserts that even the first prong of Section 848, requiring that the defendant violate "any provision" of the narcotics laws, which violation is part of a continuing series of such violations, does not require unanimous agreement as to the specific violation committed. The government contends that "[b]ecause of the breadth of that requirement, and its failure to focus on any particular violation of law, jurors may base their conclusions on different predicate acts, as long as they all agree that the defendant committed a violation of one of the drug laws."[3] This breathtaking assertion suggests that the jury should be allowed to convict although they cannot agree as to defendant's commission of even one specific narcotics

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[3] Government's Brief, p. 24.

violation. This conclusion is contrary to the plain meaning of the statute. Although any violation of the narcotics laws which is punishable as a felony, whether that be distribution, possession or manufacture, suffices to establish the first prong, such a violation, specific by its very nature as to time, place and participants, must be proved to the satisfaction of the jury.[4]

B. Historical and Contemporary Practice Favors an Interpretation of the CCE Requiring Juror Unanimity as to the Predicate Narcotics Violations.

The government argues that historical and contemporary practice supports the position that the "continuing series" element may be proved with a unanimous finding that the series has been established rather than a finding that each constituent narcotics offense has been committed. This is premised upon the existence of a number of cases involving state laws prohibiting "course-of-conduct" offenses. The government's reliance on the rationale in those cases is misplaced.

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[4] Although the government correctly notes that the failure to instruct the jury that it must unanimously agree to the commission of the particular offense satisfying the first prong of the statute was not raised directly at trial or on appeal, it is inextricably involved in the argument as to the propriety of the trial court's instructions in this case. Section 848(c)(1) requires that a violation be committed that is part of a continuing series of such violations. Had the jury been properly instructed that it be unanimous as to each of the three predicate offenses constituting the series, the first prong of the statute would perforce have been satisfied.

The fundamental Due Process rule, "steeped in antiquity," (and recognized in the cases cited by the government), is that the prosecution must prove a specific act and the twelve jurors must agree on a specific act in order to convict a defendant of an offense. *People v. Van Hoek*, 246 Cal.Rptr. 352 (Ct.App. 1988); *People v. Madden*, 171 Cal.Rptr. 897, 899 (Ct.App. 1981); *People v. Castro*, 65 P. 13, 14 (Cal. 1901).[5] In light of that rule, an "either/or rule" has evolved in cases where a defendant is charged with a single criminal act and the evidence shows more than one of such acts. To wit, either the prosecution must select the specific act relied on to prove the charge, or the jury must be instructed that it must unanimously agree that the defendant committed the same specific criminal act. *People v. Gear*, 23 Cal.2d 261, 264 (Ct.App. 1993) (citing *People v. Gordon*, 212 Cal.Rptr. 174 (Ct.App. 1985)).

There has developed over the years, however, an exception to that rule for cases involving continuous conduct resulting in but one offense. That exception is quite limited.

> There is a fundamental difference between a continuous crime spree and continuous conduct resulting in one specific offense. The continuous conduct exception applies, if at all, to those types of offenses where the statute defining the crime may be interpreted as applying, on occasion, to an offense which may be continuous in nature such as failure to provide, child abuse,

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[5] Most of the cases cited by the government were decided in the California courts, and accordingly the discussion herein relates to the development of the continuing-course-of-conduct exception in that jurisdiction.

> contributing to the delinquency of a minor, driving under the influence and the like. [Citations omitted].

People v. Madden, supra, 171 Cal.Rptr., at 900.

Several of the cases cited by the government illustrate the types of offenses to which the exception applies, highlighting the differences between an offense defined as one of a continuing nature and one which is defined as one of an instantaneous nature. Thus, whereas burglary is completed instantaneously at the moment a person enters a structure with the requisite intent, harboring a fugitive is a continuing offense committed over a period of time. In *People v. Gunn,* 242 Cal.Rptr. 834 (Ct.App. 1987), the prosector charged the defendant under the California Statute which is violated by one who "harbors, conceals or aids" a known felon with specific intent that he escape arrest, trial, conviction or punishment. The prosecutor did not describe in the charge the specific acts of aiding, harboring or concealing which were thereafter shown by the evidence at trial. Therefore the case was charged on the theory that the crime consisted of a "continuous course of conduct rather than a series of separate acts." *People v. Gunn, supra,* at 839.[6]

Separate acts also may result in one crime if they occur within a relatively short span of time. *People v.*

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[6] A number of the cases cited in the government's brief fall into the same category. *See People v. White,* 152 Cal.Rptr. 312 (Ct.App. 1979) (procuring); *People v. Ewing,* 140 Cal.Rptr. 299 (Ct. App. 1977) (child abuse); *People v. Lowell,* 175 P.2d 846 (Cal.Dist.Ct.App. 1946) (contributing to the delinquency of a minor).

McIntyre, 176 Cal.Rptr. 3 (Ct.App. 1981) (Forcible rape followed immediately by forcible oral copulation). But in *People v. Epps,* 176 Cal.Rptr. 332, 339 (Ct.App.1981), the court found separate incidents of touching and kissing over a period of two months to be a single act on each occurrence and refused to apply the continuous conduct exception.[7]

Criminal acts against children present unique problems of proof, which fact has resulted in the relaxation of the rule requiring juror unanimity as to specific acts charged, and the inclusion of child abuse and similar crimes in the "continuing offense" category. Child abuse, and offenses similar to it such as failure to provide for a minor child, are areas where it is possible that a series of acts, which if individually considered, might not amount to a crime, but the cumulative effect is criminal. *See People v. Epps,* 176 Cal.Rptr. 332, 339 (Ct.App. 1981). In *People v. Ewing,* 140 Cal.Rptr. 299 (Ct. App. 1977), the court recognized that the child abuse statute, although it may be violated by a single act, more commonly covers repetitive or continuous conduct. Thus in *People v. Ewing, supra,* the

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[7] In *People v. Diedrich,* 182 Cal.Rptr. 354, 364 (1982), the California Supreme Court refused to apply the continuous crime exception to a case where the defendant was charged with one count of bribery but evidence of two instances of bribery was introduced at trial. The court recognized the exception to apply only in cases where the acts were so closely connected in time that they formed one transaction, unlike the bribery case before that court, and in cases where the type of offense, in itself, consists of a continuous course of conduct, such as pandering, child abuse and contributing.

court recognized that evidence of battered child syndrome, denoting repeated injuries inflicted over a span of time, is admissible in child abuse prosecutions as evidence precluding an inference of accident. 140 Cal.Rptr., at 301.

In *People v. Van Hoek, supra,* a California appellate court addressed the problems presented by cases of residential child molestation. Child molestation had been defined as a specific offense complete upon an incident of molestation. In *Van Hoek* the victim testified to a generic series of molestations and acts of sexual intercourse occurring when she was between the ages of three and thirteen, but could not link the offenses to any specific date or event. The court found insurmountable due process obstacles to a prosecution under those circumstances, including the jury's inability to agree unanimously as to the commission of any specific offense, as well as the defendant's inability to mount an effective defense to such charges. *People v. Van Hoek, supra,* 270 Cal.Rptr., at 619.

The *Van Hoek* case led to the California legislature's enactment of the new offense of continuous sexual abuse of a child.[8] The solution adopted by the legislature was

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[8] Cal.Pen.Code § 288.5 provides:

(a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished . . .

(b) To convict under this section the trier of fact, if a jury need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number.

(c) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim.

the creation of a new offense designed to fall within the continuous course-of-conduct exception to the general rule. The California Supreme Court, in *People v. Jones,* 51 Cal.3d 294, 270 Cal.Rptr. 611 (1990), in discussing the sufficiency of the evidence to convict the defendant of twenty-eight counts of lewd and lascivious behavior on the strength of generic testimony of a young victim, acknowledged that Section 288.5 might be susceptible to the due process challenges recognized in the *Van Hoek* case. 270 Cal.Rptr., at 620. Justice Mosk, in dissent, highlighted the serious problems faced by a defendant in mounting a defense based on the credibility of a prosecution witness giving generic testimony:

> The person faced with generic testimony, however, can make only the most generalized attack on his accuser's credibility. Unable to cross-examine the child as to the details of the molestation, he can never show, for example,

> that these details render the child's story physically impossible, or highly unlikely, or contradictory.

People v. Jones, 270 Cal.Rptr., at 633. These same due process concerns will apply to the case of a defendant charged with a CCE violation if the jury is permitted to convict upon its unanimous agreement only that three non-specific offenses were committed.

Furthermore, the opinion of the court in *Jones* emphasized the "safeguards" written into Section 288.5 to balance the state's compelling interest in prosecuting child molesters with the protection of the defendant's rights. Those include the limitation that the defendant be charged with only one count per victim, the requirement that the jurors agree that the defendant committed a minimum of three acts of sexual abuse, and the requirement that the defendant have had a minimum of three months continuous access to the victim. *People v. Jones, supra*, 270 Cal.Rptr., at 632. The court's emphasis on these safeguards, in the context of the singular problem of child witness testimony, coupled with its acknowledgment of the possible constitutional infirmity of the statute, suggest that historical practice, contrary to the government's assertion here, is against the use of continuous course-of-conduct statutes to avoid the general rule that every element of an offense must be unanimously agreed to by the jury.

In *People v. Gear, supra*, cited by the government in support of its position, a California appellate court, extremely concerned about the problem of residential child molestation upheld the constitutionality of Section 288.5, refusing, however, even to discuss the holding of

the Third Circuit in *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988). The court did acknowledge that *Echeverri* is in direct conflict with its holding. The court refused to follow *Echeverri*, assertedly because the court in *Echeverri* had not addressed the continuous course-of-conduct exception. *People v. Gear*, 23 Cal.Rptr.2d, at 266.[9]

Historical practice, thus contrary to the position of the government, favors a due process requirement that each constituent act of an offense be proved to the unanimous satisfaction of the jury. Although the continuous-course-of-conduct exception has been recognized and applied in limited circumstances, it is limited. The proof problems presented by child molestation cases have resulted in recent legislation, which is beginning to be tested in the courts, which criminalize repetitive conduct against children by defining it as continuous. Some of these cases present analogous due process questions to that in the case before this Court. They can hardly be characterized as accepted historical and contemporary practice such as would legitimize an interpretation of the CCE statute to require no jury unanimity as to the "continuing series" element.

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[9] Both *People v. Reynolds*, 689 N.E.2d 335 (Ill.App.Ct. 1997), and *People v. Spigarolo*, 556 A.2d 112 (Conn. 1989), involve prosecutions for crimes against children. The serious concerns present in such cases have, for whatever reason, apparently resulted in attempts by the courts to justify a more relaxed standard for pleading and proof of that type of offense.

II. Congress Intended the CCE Statute to Require Unanimous Jury Agreement as to the Predicate Narcotics Violations.

A. The Statutory Language Supports a Construction Requiring Juror Unanimity as to the Predicate Narcotics Violations.

The language of the CCE statute supports a construction requiring proof of each predicate narcotics violation as an element of the offense. By requiring initially that the defendant be found to have committed a narcotics violation, and that the violation be one of a continuing series of such violations, the legislature emphasized the specific statutorily defined nature of the members of the series. The use of the term "series" itself, requiring as it does more specifically defined objects to give it meaning, rather than the use of a term such as business, with an accepted substantive meaning of its own, strongly suggests the legislature's intent to consider the underlying violations as elements of the violation.

The government argues that the failure of the statute to confine the list of eligible offenses to a narrow subset of drug offenses, coupled with its failure to require that the defendant be charged and convicted of such offenses, mandates the conclusion that no specific violation need be unanimously found by the jury. This conclusion is contrary to common sense and to established precedents in at least one analogous situation.

18 U.S.C. § 924(c)(1) provides for a consecutive term of incarceration if a firearm weapon is used during a

crime of violence or "drug trafficking crime."[10] It is significant that "drug trafficking crime" is defined in terms as broadly as in the CCE statute.[11] Not only that, the predicate offense may also be "crime of violence." Despite the "broad array"[12] of offenses defined as predicates, the courts have held that it is necessary that the government prove beyond a reasonable doubt all of the elements of § 924(c)(1), one of which is that the defendant committed the underlying crime. *United States v. Nelson*, 27 F.3d 199, 201 (6th Cir. 1994) (and cases cited therein). In addition, as in the case of a CCE prosecution, the government need not charge nor convict the defendant for the predicate violation. *United States v. Nelson, supra*; *United States v. Ospina*, 18 F.3d 1332, 1335-1336 (6th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2721, 129 L.Ed.2d 849

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[10] 18 U.S.C. § 924(c)(1) provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to imprisonment for five years.

[11] 18 U.S.C. § 924(c)(2) provides:

> For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

[12] Government's Brief, p. 16.

(1994); *United States v. Hill*, 971 F.2d 1461, 1467 (10th Cir. 1992). Accordingly the fact that the CCE statute defines the predicate violations broadly is not inconsistent with an interpretation of those violations as elements of the offense.

The government also argues that the courts have universally held that the identity of the "five or more other persons" required under subsection(c)(2)(A) of the CCE statute[13] is not an element to be agreed unanimously by the jury. Likewise the identity of the "substantial income or resources" required by subsection (c)(2)(b).[14] There are critical differences, however, between these predicates and the predicate narcotics violations.

As an initial matter, the predicate narcotics violations are the essence of the offense; they are what make the defendant's activities criminal. The obtaining of substantial income is not in and of itself criminal; nor is supervising a number of other people. But the commission of the narcotics violations provides the criminality. Without the narcotics violations, indeed, the statute does not even require a *mens rea*. That element is imported into the statute only by inclusion of the elements of the narcotics violations. To determine that the jury need not be unanimous as to at least one narcotics violation would remove even the *mens rea* as an element of a CCE.

Secondly, the five person requirement has an historical analogue in the law of conspiracy, which generally has

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[13] 21 U.S.C. § 848(c)(2)(A).

[14] 21 U.S.C. § 848(c)(2)(B).

not required the jury to agree unanimously on the identity of the defendant's coconspirators. *United States v. Edmonds*, 80 F.3d 810, 822 (3d Cir. 1996) (*en banc*); *see United States v. Harris*, 959 F.2d 246, 256 and n. 13 (D.C.Cir.), *cert. denied*, 506 U.S. 932, 113 S.Ct. 362, 121 L.Ed.2d 275, and *cert. denied sub nom. Palmer v. United States*, 506 U.S. 933, 113 S.Ct. 364, 121 L.Ed.2d 277 (1992). Furthermore the five or more persons requirement simply defines the size of the enterprise, not its essential criminality. *See United States v. Canino*, 949 F.2d 928, 947 (7th Cir. 1991).[15] Similarly the substantial income requirement merely defines the profitability of the enterprise. These elements therefore are not of the same fundamental nature as the predicate narcotics violations, and comparison of the treatment to be accorded each is not helpful.[16]

The CCE statute on its face requires proof, and by implication, jury unanimity, with respect to at least one

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[15] The Seventh Circuit failed to appreciate this distinction, of course, but the reasoning as far as it goes with respect to the five or more persons requirement is not unpersuasive.

[16] The government also argues that Petitioner's general approach would require unanimity with respect to the relationship between the defendant and the five or more other persons, i.e., organizer, supervisor, or other management position. (Government's Brief, p. 21). This approach is similar to the argument made by the defendant in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), that he was entitled to have the jury instructed that they must be unanimous as to the characterization of what he had done, i.e., receiving, concealing, storing, bartering of disposing of a stolen vehicle. That is not what Petitioner is suggesting in this case, where he argues that the jury must be unanimous as to what acts he actually committed, not what they should be called.

predicate narcotics violation. There is no reason to believe the legislature intended that the predicate narcotics violations comprising the "series" of which it must be a member should not also be proved to the unanimous satisfaction of the jury.

B. The Legislative History Supports the Construction of the CCE Statute to Require Juror Unanimity as to the Predicate Narcotics Violations.

The legislative history cited by Petitioner in his opening brief is strong evidence that the legislature was concerned with preserving a defendant's due process rights by defining in the CCE statute a separate offense rather than a sentencing enhancement. Representative Eckhardt's concerns that a man be proved guilty of "every element" of the offense suggests a focus on specificity.[17] The government argues that this begs the question as to what the elements of the offense are.

It should be noted that the courts have had no trouble recognizing proof of the predicate narcotics offense to be a necessary element in the analogous firearms statute discussed *infra*, also in the context of distinguishing a sentencing enhancement statute from one which creates a stand alone offense. In *United States v. Nelson, supra*, the court, citing to several other cases, stated that

> because § 924(c) is a separate offense, 'a conviction and sentence under § 924(c) requires the full panoply of constitutional safeguards ordinarily granted criminal defendants. [citations omitted]. Therefore, while it is necessary for the government to present proof of the underlying crime to convict under § 924(c), a defendant need not be convicted or even charged with the underlying crime to be convicted under § 924(c). [citations omitted].

[17] 116 Cong. Rec. 33,631 (1970) (remarks of Rep. Eckhardt).

27 F.3d, at 200. The court went on to state,

> [w]hile it is not necessary for the government to charge a defendant with the underlying drug trafficking crime . . . it is, of course, necessary that the government prove beyond a reasonable doubt all of the elements of § 924(c), one of which is that the defendant committed the underlying crime.

Id. at 201. The court went on to reverse the defendant's conviction because the jury had not been instructed as to the elements of the underlying drug trafficking offense.

Likewise it is reasonable to infer that the legislature's concerns about due process, in the context of Representative Eckhardt's remarks, centered around the proof of the underlying elemental criminal acts comprising the CCE offense.

The government argues that we must interpret the statute to require no unanimity as to the underlying criminal conduct because the legislature was very concerned about the escalating drug problem, and to require unanimity would make convictions more difficult. To adopt that argument is to suggest that the legislature will condone almost any encroachment on constitutional safeguards for the defendant, since "the punitive purpose of a criminal statute will never be served by providing more procedural protections to the defendant. A statute's

broad goal says little about whether the different acts falling within the statute are means or offenses, or about the requisite degree of jury agreement." *United States v. Edmonds, supra,* at 818.

Accordingly, the legislative history provides no support for the government's position, but provides a significant amount for Petitioner's position. The combination of the legislative history and a logical reading of the statute itself require a construction of the statute to require juror unanimity as to the predicate offenses.

CONCLUSION

For all of the foregoing reasons, Petitioner Eddie Richardson respectfully requests this Court for an order reversing and remanding for a new trial his conviction on Count Two of the Indictment.

Respectfully submitted,

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(8)

No. 97-8629

In The

Supreme Court of the United States

October Term, 1998

EDDIE RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court has limited its grant of certiorari to the following question:

Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "series of violations" required for conducting a continuing criminal enterprise in violation of 21 U.S.C. §848.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives are to promote the proper administration of justice.

This case raises important questions concerning the special considerations applicable to the prosecution and defense of such unique compound complex federal crimes as the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1961 *et seq.*) and the Continuing Criminal Enterprise statute (21 U.S.C. §848). In particular, the Court must examine the constitutional implications applicable to the requirement of jury unanimity with respect to the underlying criminal acts

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[1] Both parties have consented to NACDL's appearance as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

required to be found in order to constitute the "series of violations" which is a necessary element of a CCE violation — a statutory element analogous to the "pattern of racketeering activity" required to be found under the RICO statute.

SUMMARY OF ARGUMENT

In re Winship, 397 U.S. 358, 364 (1970), mandates that each element of a criminal offense must be proven beyond a reasonable doubt. In federal courts, the jury must agree unanimously that the prosecution has met this burden as to each element of a federal criminal offense. *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972)(Powell, J., concurring)("In an unbroken line of cases reaching back to the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the essential features of the federal jury trial")(collecting cases).

This case revisits, in the context of a federal criminal statute, an issue addressed most recently in *Schad v. Arizona*, 501 U.S. 624 (1991) — *viz.* the level of factual specificity on which the jury must be unanimous before it may convict of a compound-complex federal crime containing multiple factual and legal elements.[2] Notwithstanding *Schad*, a state prosecution involving the distinction between premeditated and felony-murder, the federal question remains anything but

[2] "Compound-complex criminal statutes generally target large-scale criminal activity by requiring that a defendant have engaged in a 'pattern' or 'series' of criminal conduct. The 'pattern' or series' must consist, in turn, of a specific number of predicate acts defined elsewhere in the criminal code." Eric S. Miller, Note, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 Yale L.J. 2277, 2278 (1995).

clear. *See, e.g., United States v. North*, 910 F.2d 843, 873-75 (D.C. Cir. 1990)("in order to return a unanimous verdict of guilty on a count involving multiple distinct underlying acts, jurors are required to be unanimous as to the specific act by which the defendant violated the law"); *United States v. Beros*, 833 F.2d 455, 462 (3d Cir. 1987)(Higginbotham, J.)("When the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond reasonable doubt at least one of the theories to the satisfaction of the entire jury"); *United States v. Peterson*, 768 F.2d 64, 67 (2d Cir. 1985)(Friendly, J.)(*accord*).

Under the Continuing Criminal Enterprise statute (21 U.S.C. §848), the government must prove that the defendant committed a felony violation of the federal substantive narcotics laws as well as proving that this violation was part of a "continuing series" of violations.[3]

The critical question, then, is whether the jury must agree unanimously merely that the defendant committed any

[3] While Congress never defined the term "continuing series", the lower courts are largely in agreement that the term means three or more violations of the substantive narcotics laws. *See, e.g., United States v. Edmonds*, 80 F.3d 810, 814 (3d Cir. 1996)(*en banc*); 2 Edward J. Devitt *et al.*, *Federal Jury Practice and Instructions* §55.05 (4th ed. 1990 & Supp. 1998)(collecting cases by circuit).

The only exception is the Seventh Circuit. *United States v. Baker*, 905 F.2d 1100, 1105 (7th Cir. 1990)(two substantive predicates, not including conspiracy). However, as one commentator has noted, the *Baker* court's disagreement is more over form than substance. Cyrus Amir-Mokri, Comment, *Predicate Offenses and Jury Agreement Under The Continuing Criminal Enterprise Statute*, 1994 U. Chi. Legal F. 325, *id.* at n.5, 338 n.88.

three charged or uncharged narcotics-related violations or whether they must agree unanimously on the same three violations.

On its face, the CCE statute gives little indication of its intent with respect to jury unanimity. Nevertheless, guided by historical tradition, constitutional considerations and the rule of lenity, applicable where a criminal statute is ambiguous on its face, it is manifest that a compound-complex criminal statute that incorporates formerly separate crimes — crimes that may take place at different times and different places — should generally be read to require jury unanimity as to each predicate offense. *Edmonds*, 80 F.3d at 815.

In order to resolve due process concerns, Congress decided against the original recidivist sentencing bill — which would have allowed draconian sentence enhancement based on uncharged conduct — and passed instead a substantive CCE offense which had to be tried to a jury. Congress subsequently approved sentencing guidelines which equally penalize (a) separately-charged drug offenses serving double-duty as "continuing series" crimes and (b) uncharged offenses offered solely to prove the CCE "series." This suggests that Congress indeed intended the predicate "series" crimes — even when not charged as separate offenses — to be treated as elements of CCE which must be found beyond a reasonable doubt by a unanimous jury; this is not unlike the multiple predicate acts that must be proven in order to sustain the "pattern of racketeering activity" required under the contemporaneously-enacted RICO statute.[4] Any other view of § 848 would closely

[4] RICO was enacted as part of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922. The CCE statute was enacted as part (continued...)

resemble Congress' rejected recidivist statute, whereby a defendant could be sentenced as a drug kingpin for uncharged crimes and without the due process afforded by a unanimous jury verdict.

Moreover, the Due Process Clause of the Fifth Amendment and the Sixth Amendment right to a unanimous jury verdict in federal court require the "continuing series" crimes to be treated as an element of the CCE offense which must be agreed upon by the jurors. CCE is a uniquely modern, "compound-complex" federal statute, with no roots in history. A historical analogue, however, may be found in statutes held unconstitutionally vague because of the multiple and disparate means by which the offense could have been committed. Furthermore, the practice of treating the "continuing series" crimes as separately-charged substantive offenses in the indictment is wide-spread policy in at least four circuits.

Accordingly, Fifth Amendment due process requirements demand that juries agree unanimously upon the specific predicate offenses necessary for a compound-complex felony conviction. On a functional level, this constitutional prescription requires district judges to issue specific unanimity instructions to juries whenever the prosecution presents evidence of more than the requisite number of predicate acts, irrespective of whether the predicates are pleaded in the indictment as separate substantive offenses. In addition, the use of special interrogatories at the time of verdict would give meaning to this constitutional protection without destroying the

[4](...continued)
of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236.

additional protection a general verdict affords criminal defendants.

ARGUMENT

CONGRESSIONAL INTENT AND PRINCIPLES OF DUE PROCESS REQUIRE JURY UNANIMITY ON EACH OFFENSE ALLEGED TO BE PART OF THE "CONTINUING SERIES" OF VIOLATIONS UNDER §848

21 U.S.C. § 848(c) provides, in pertinent part:

> [A] person is engaged in a continuing criminal enterprise if–
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony; and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter. . .

A. Congress Intended Juries to Agree on the Offenses Constituting a "Continuing Series" Whether Or Not Charged As Separate Offenses In The Indictment.

"The question whether statutory alternatives constitute independent elements of the offense . . . is a substantial question of statutory construction." *Schad,* 501 U.S. at 636. The relevant legislative history and subsequent developments here

strongly suggest that Congress intended each crime which is part of the "series" to be treated as an element of the CCE offense. If this is so, "patchwork verdicts" are forbidden.[5]

In *Garrett v. United States*, 471 U.S. 773 (1985), this Court reviewed the Congressional debate as to whether the CCE should be a mere recividist sentencing provision or a substantive offense, *id.* at 782-785, and concluded that Congress "intended CCE to be a separate offense and . . . to permit prosecution for both the predicate offenses and the CCE offense." *Id.* at 786.

The outcome of this debate and the move away from a CCE as mere sentence enhancement was driven by concerns for the due process rights of the accused. Redrafting of the House bill which ultimately prevailed in Congress was in large part a response to "constitutional criticism and to suggestions going to due -- and fair -- process." H.R.Rep. No. 91-1444, *reprinted in* 1970 U.S.C. C.A.N. 4566, 4648 (Additional Views). The CCE provision, specifically, had been redrafted because of "serious objections" on constitutional grounds to the enhanced sentencing procedures, including provisions for keeping certain evidence secret from the defendant and shifting the burden of proof to him on a key element. *Id.* at 4650-4651.

The end result "made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court." *Id.* at 4651. Even with the traditional due process protections of a criminal trial in place, however, the writers of additional views on the final bill

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[5] A "patchwork verdict" results "by piecing together the jurors' different conceptions of the predicate acts that satisfy the continuing series element of the offense." Miller, 104 Yale L.J. at 2282.

nonetheless expressed continued dismay over the vagueness of the provision in issue here:

> The definition of what is a continuing offense is indefinite in that . . . *[i]t is not at all clear what constitutes a "continuing series of violations of this title or title III * * *."* Suppose, for instance, that six young men attending a college reside together in a cooperative boarding house. All of them have engaged in the practice of smoking marihuana cigarettes and there has been, on a day or more, free exchange between them of such forbidden drug. Each incident of giving a cigarette to another constitutes a felony. How long must this practice continue in order to constitute a "continuing series of violations"? Would a single day's experiment with smoking "pot" constitute a continuing series of violations," or would it require a week, a month, or a year of such activities to make the offenses "continuing"?

Id. at 4651.

The bill passed with no further clarification. What was clear, however, was that Congress had rejected an approach that allowed uncharged conduct to be considered merely as evidence to be weighed at the time of sentencing, and that Congress did so because of serious concerns about due process. 116 Cong. Rec. 33,361 (remarks of Rep. Eckhardt).[6]

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[6] A short discussion of the legislative history, amplifying this Court's discussion in *Garrett*, may be found in Katherine L. Harvey, Note, (continued...)

Whether Congress intended to allow juries to create a patchwork of "series" crimes, however, has been further illuminated by its review and acceptance of the United States Sentencing Commission Guidelines applicable to a CCE and its predicate offenses.[7] The Guidelines themselves "have the force and effect of laws." *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

By virtue of the "relevant conduct" and "grouping" provisions, the Guidelines make no distinction for purposes of sentencing between drug crimes charged as separate substantive offenses and also offered as CCE "series" crimes, as in *Garrett*, and drug crimes introduced, as here, solely to prove the "series." The base offense level for determining the guideline sentencing range is "predicated in large part on the amount of drugs involved," which in turn is predicated on all acts by the defendant which "'were part of the same course of conduct or common scheme or plan as the offense of conviction,' whether or not charged in the indictment." *United States v. Sklar*, 920 F.2d 107, 110 (1st Cir. 1990); U.S.S.G. §§ 1B1.3(a)(2), 3D1.2(d). In a CCE prosecution, the CCE and its "series" crimes — whether or not separately-charged offenses — are then grouped for purposes of aggregating the quantity of drugs. *United States v. David*, 940 F.2d 722, 741 (1st Cir. 1991).

Since Congress expressly rejected, on due process grounds, the CCE recidivist sentencing bill, its approval of

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[6](...continued)
United States v. Canino and the Continuing Criminal Enterprise: Do Drug Kingpins Have a Right to Specific Juror Agreement?, 15 W. New Eng. L. Rev. 271, 274-76 (1993).

[7] Federal Sentencing Guidelines Manual, 1998 Edition, Ch. 1, Pt. A(2), p. 1 (1997); 28 U.S.C. § 994(p) (process for Guidelines approval).

these guidelines strongly suggests an intent that any crime used to prove a "series" – whether or not charged in a separate count — must be treated as a distinct element of § 848. Otherwise, a CCE tried and sentenced -- as here -- on predicates not separately charged comes uncomfortably close to the rejected scheme whereby a defendant's sentence could be enhanced "without his knowing what the evidence against him was." 116 Cong. Rec. 33,630 (1970) (remarks of Rep. Eckhardt). Equally incongruous is the idea that Congress -- demonstrably concerned about providing the maximum process due in a CCE prosecution — would, on the one hand, approve sentencing guidelines which treat "series" crimes the same, whether or not separately charged, and, on the other hand, have no problem with a "series" crime being treated as an element of a CCE only if the prosecutor chooses to charge it as a separate count. Making CCE a crime, rather than a mere sentence enhancement, was intended to give prosecutors less, not more, control over the burden of proof.

To the extent that the language and legislative history of the CCE statute do not conclusively demonstrate Congress' intent with respect to specific unanimity on the predicate offenses, principles underlying the rule of lenity as it applies to ambiguous federal criminal statutes dictates that the statute be construed in defendants' favor on this crucial question. *See, e.g., Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Bass*, 404 U.S. 336, 347-48 (1971); *Ladner v. United States*, 358 U.S. 169, 178 (1958). Accord, *United States v. Edmonds*, 80 F.3d at 820-821 (rule of lenity requires construction of CCE statute requiring specific unanimity).

Accordingly, this Court must conclude that Congress intended each of the crimes constituting a "series of offenses" must be treated as an element and thus must be found by a

unanimous jury beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364.

B. If Congress Did Not Intend the Predicates of a "Continuing Series" to be Treated as Elements of the CCE Offense, the Fifth and Sixth Amendments Nonetheless Require Such Treatment.

The Due Process Clause of the Fifth Amendment and the right to a jury trial guaranteed by the Sixth Amendment "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 509-510 (1995). The question is whether each crime necessary to prove a "series" must be viewed, because of due process considerations, as a "fact necessary to constitute the crime with which [the defendant] is charged." *Winship*, 397 U.S. at 361-64.[8]

History — the first due process factor in *Schad* — has only limited relevance here. As this Court noted, "history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots than it is in cases . . . that deal with crimes that existed at common law." *Schad*, 501 U.S. at 640 n.7. The CCE statute is a uniquely modern product of our times, addressing the problem of

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[8] *Winship*'s holding under the Fourteenth Amendment was compelled by Fifth Amendment due process analysis and historical practice.

ongoing, large-scale traffic in illegal drugs.[9] The "series" provision, originally part of a recidivist sentencing statute, was ultimately passed as an element of the offense whose purpose was to elevate a primary felony (21 U.S.C. §848(c)(1)) to a super-felony with greatly enhanced penalties. In a very concrete sense, this is an example of Congress doing what this Court recently doubted it had ever done: making "a defendant's recidivism an element of an offense where the conduct proscribed is otherwise unlawful." *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1231 (1998).

To the extent that this statute does have "a historical analogue," one commentator has noted, "it is in the broadly defined common law crimes that courts have long since declared unconstitutionally vague." Miller, 104 Yale L.J. at 2298-99 & n.111, *citing, e.g., State v. Palendrano*, 293 A.2d 747, 748 (N.J. Super. Ct. Law Div. 1972) (holding unconstitutionally vague the common law crime of being a "common scold," which could consist of "brawling,

[9] It should be remembered that *Schad's* due process analysis was constrained by this Court's deference to state law in cases arising under the Fourteenth Amendment. 501 U.S. at 638-639; *Medina v. California*, 505 U.S. 437, 445-446 (1992). That analysis thus rested in large part on "historical and contemporary acceptance of Arizona's definition of the offense" of murder, including treatment of the offense at common law, *id.* at 640-41, and 648-51 (Scalia, J., concurring). By contrast, the present case involves a modern, compound-complex federal statute: a *sui generis* creature of Congress. *Liparota v. United States*, 471 U.S. 419, 424 & n.6 (1985) (while federal crimes are "solely creatures of statute," Congress must "act within any applicable constitutional restraints in defining a criminal offense"). This Court's duty when measuring a federal criminal statute by the standards of the Due Process Clause of the Fifth Amendment is not tempered -- as it was in *Schad* -- by any deferential federalism concerns.

wrangling, breaking the public peace, increasing discord, and/or being a nuisance"). History — and historical concerns about specificity discussed later in this section — favors treatment of "series" crimes as elements.

The second *Schad* factor, "widely shared practice," 501 U.S. at 637, also favors jury unanimity on the "series" crimes. In addition to the Third Circuit requiring unanimity — *Edmonds*, 80 F.3d at 822 — three other circuits have model charges assuming that "series" crimes are separately charged offenses.[10] These model instructions are indicative of the fact

[10] Pattern charges for a "continuing series" in these circuits are reproduced in 2 Edward J. Devitt *et al.*, *Federal Jury Practice and Instructions* § 55.05 at 377 (4th ed. Supp. 1998), as follows:

> The [indictment charges] [Government contends] that the [violations *charged in Counts ___ and ___*] [defendant's previous convictions] for (list convictions)] are part of the series of three or more violations. [*You must unanimously agree on which three violations* constitute the series of three or more violations in order to find that essential element No. Two has been proved.]" Manual of Modern Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.21.848A (1996) (emphases added).
>
> A "continuing series of violations" means at least three violations of the Controlled Substances Act *as charged in Counts _* of the indictment, and also requires a finding that those violations were connected together as a series of related or ongoing activities as distinguished from isolated and disconnected acts. In this case, a 'continuing series' means at least three of the violations *alleged in the ___ counts of the indictment*. Pattern Jury Instruction of the District Judges Association of the Fifth Circuit, Instruction No. 2.84 (1990) (emphases added).

(continued...)

that many prosecutors throughout the country routinely charge "series" crimes as separate substantive counts, a practice which automatically confers on each "series" crime separate consideration as an element.

An additional due process factor in *Schad*, as applied here, is an evaluation of the "moral and practical" equivalence of the various crimes which can make up a "series." This test strongly favors unanimity; the range of possible predicates is vast and varied in degrees of blameworthiness. In a large-scale drug trial where evidence of myriad crimes — not separately charged — is introduced to prove the "series," it is perfectly conceivable that juror A could predicate a "series" on one count of simple possession of a few grams of cocaine base, 21 U.S.C. § 844, and two counts of making a telephone call to facilitate possession of these same few grams, 21 U.S.C. § 843(b); while juror B would base her verdict on three different counts of importing boatloads full of heroin. 21 U.S.C. §960(a).

Finally, the *Schad* plurality recognized the due process factor of vagueness. The Due Process Clause:

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[10](...continued)
A "continuing series of violations" means proof of at least three violations of the Federal controlled substances laws *as charged in Counts* ___ of the indictment, and also requires a finding that those violations were connected together as a series of related or ongoing activities as distinguished from isolated and disconnected acts." Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 63 (1985). 2 Devitt *et al.*, at 955-57.

> carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him. . . [N]othing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction.

501 U.S. at 633. Justice Scalia, concurring, agreed "that one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process." *Id.* at 650.

A CCE based on a series of uncharged offenses is just such a novel "umbrella" crime, except the umbrella metaphor needs revising: the number and variety of possible predicate crimes that a CCE can incorporate is just too vast. Unless the "series" crimes are charged as elements and unanimously proved as elements, a CCE is just a generic "big-time drug dealer" crime. In short, the defendant is in no position to "understand with some specificity the legal basis of the charge against him." *Schad*, 501 U.S. at 633.

If, as this Court has noted, rationality is at the heart of due process, *Schad, id.* at 637, there is something disturbingly irrational for a court to require each juror to find beyond a reasonable doubt that a CCE defendant committed at least three predicate offenses but not to require them to agree on the identity of these offenses. This muddled, pick-and-choose use of the reasonable doubt standard in itself "casts too much doubt

on the accuracy of the verdict." *Edmonds*, 80 F.3d at 818 n.10; *see, e.g.*, Scott W. Howe, *Jury Fact-Finding in Criminal Cases*, 58 Mo. L.Rev. 1, 7, 81-83 (1993)(a factual concurrence mandate follows from the *Winship* principle that a conviction must rest on proof beyond reasonable doubt of all the facts necessary to establish the crime).

This Court should therefore conclude that the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee of a jury verdict require juror unanimity on the crimes making up the "series of offenses" necessary for a CCE conviction. 21 U.S.C. § 848 is a complex crime requiring proof of a series of other crimes; in this context, a patchwork verdict -- based on twelve individual jurors' idiosyncratic conclusions about which crimes form the "series of violations" -- offends both Congressional intent and due process. Each crime alleged to be one of the necessary "series" is an essential element on which jurors must unanimously agree beyond a reasonable doubt. And they must be so instructed by the district judge.

C. Unanimity Instructions And Special Verdicts

The appropriate procedures by which jury unanimity as to predicates may be enforced while at the same time providing a record of sufficient specificity to enable meaningful appellate review of the jury's factual determinations is for the trial court to give an instruction to the jury that goes beyond the general instruction of unanimity – an instruction directing the jury that it must agree unanimously on the specific predicate acts it deems proven as part of the "continuing series" of violations under CCE or the "pattern of racketeering activity" under RICO. *See United States v. Echeverri*, 854 F.2d 638, 643 (3d

Cir. 1988)("The usual rule that a general unanimity instruction is sufficient gives way 'where the complexity of the case, or other factors, creates the potential that the jury will be confused'")(a specific unanimity instruction is warranted in a CCE case where there was evidence of numerous alleged predicate acts, any three of which could have been the focus of a particular juror and where the complexity and other factors were "obvious").

The district court should also have the discretion to monitor the jury's unanimity determination as to predicates by submitting special verdict forms or special interrogatories by which the jury may indicate which predicates were unanimously agreed upon. *See United States v. Ruggiero*, 726 F.2d 913, 922-23 (2d Cir. 1984); *id.* at 925-28 (Newman, J., concurring in [relevant] part and dissenting part)(the use of special interrogatories as to predicate acts in criminal RICO cases should be encouraged as an aid to meaningful appellate review of complex criminal cases, particularly in the event some but not all predicates are vacated on appeal); Robert M. Grass, Note, *Bifurcated Jury Deliberations In Criminal RICO Trials*, 57 Fordham L. Rev. 745, 752-53 & nn.49-54 (1989)(collecting authorities on special interrogatories in complex RICO prosecutions).

Of course, where predicate acts have been charged as separate substantive counts in an indictment, then general verdicts on the substantive charges would serve the same function as special interrogatories because a general verdict would indicate which of the predicate acts supported the CCE or RICO prosecution. Where the predicates are not separately charged, however, neither the trial court nor the appellate court reviewing the inevitably lengthy trial record would be in a position to meaningfully determine jury unanimity on a

frequently lengthy list of predicates necessary to constitute the requisite "series" or "pattern". *See, e.g., United States v. Palmeri*, 630 F.2d 192, 202-03 (3d Cir. 1980)(jury directed to indicate which of 46 predicates were proven in a multi-defendant RICO case); *United States v. Pungitore*, 910 F.2d 1084, 1136 & n.74 (3d Cir. 1990)(listing predicates); *Ruggiero*, 726 F.2d at 922-23. *See also* Miller, 104 Yale L.J. at 2202-06 & nn.131-148 (collecting authorities).

Certainly, there is more than abundant case law upholding the district courts' requisite discretion to utilize special interrogatories where the "risk of prejudice to the defendant is slight and the advantage of securing particularized fact-finding is substantial". *Ruggiero*, 726 F.2d at 927.

More to the point, this Court may exercise its supervisory power over the federal court system in directing the procedures that may be utilized by the trial courts in the administration of a federal criminal statute. In particular, the Court may require the lower courts under its supervision "to follow procedures deemed desirable from the point of view of sound judicial practice although in nowise commanded by statute or the constitution". *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). This supervisory power extends to jury instructions deemed advisable, though not constitutionally compelled. *United States v. Rubio-Villareal*, 967 F.2d 294, 297 (9th Cir. 1992). *See also* Sara Sun Beale, *Reconsidering Supervisory Power In Criminal Cases: Constitutional And Statutory Limitations On The Authority Of The Federal Courts*, 84 Colum. L. Rev. 1433, 1490-91 (1984)(federal court's exercise of supervisory power appropriate where directed to matters regulating judicial trial procedure).

Accordingly, this Court should direct that trial jurors be instructed that they must be in unanimous agreement as to the predicate acts they are required to find as part of a "continuing series" of violations under CCE or a "pattern of racketeering activity" under RICO. Moreover, the district courts' discretion to utilize special interrogatories at the time the jury returns its verdict should also be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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